JANUARY 3, 1770.

INFORMATION

FOR

ARCHIBALD Earl of *Eglintoun*, and JAMES MONTGOMERY, Eſquire, his Majeſty's Advocate, for his Majeſty's Intereſt;

AGAINST

MUNGO CAMPBELL, Exciſe-officer at *Saltcoats*, in the County of *Air*, now Priſoner in the Tolbooth of *Edinburgh*, Pannel.

THE ſaid *Mungo Campbell* ſtands indicted and accuſed of the Crime of *Murder*, " In ſo far as the deceaſed *Alexander* " Earl of *Eglintoun* having, the Time libelled, gone out " from his Houſe of *Eglintoun*, in the County of *Air*, in " his Coach, to look at ſome of his Grounds, and being told by " one of his Servants, when upon the Road from *Saltcoats* to " *Southennan*, within the Pariſh of *Ardroſſan* and ſaid County of " *Air*, that he obſerved two Perſons, one of them with a Gun, at " a ſmall Diſtance, upon his Lordſhip's Ground of *Ardroſſan*, the " ſaid deceaſed Earl, who by an Advertiſement in the News Pa- " pers, had forbid all unqualified Perſons to kill Game within his " Eſtate, came out of his Coach unarmed, and mounted a Horſe, " which was led by his Servant, and leaving in his Coach an un- " loaded Gun, he rode towards the two Perſons, who in the mean " time went off the Earl's Grounds of *Ardroſſan* into the adjacent " Sands; and he having come near to the two Perſons on the ſaid " Sands, and diſcovering the one with the Gun to be the ſaid *Mungo*

" *Campbell*,

" *Campbell*, he accoſted him, by ſaying, *Mr.* Campbell, *I did not ex-*
" *pect to have found you ſo ſoon upon my Grounds, after the Promiſe*
" *you made me, when I laſt catched you, when you had ſhot a Hare.*"
" And the Earl having thereupon deſired him to deliver his Gun
" to him, he refuſed ſo to do; and upon the Earl's approaching
" towards him, he cocked his Gun, and preſented, or pointed it
" at him; and upon the Earl's then ſaying, *Sir, will you ſhoot*
" *me?* he anſwered, That he would, if his Lordſhip did not keep
" off. To which the Earl replied, That if he had his Gun, he
" could ſhoot pretty well too, or uſed Words to that Import, and
" deſired a Servant to bring his Gun from his Coach, which was
" then at ſome Diſtance; and the Earl having diſmounted, and
" walked towards him, leading his Horſe in his Hand, without
" Arms or offenſive Weapons of any Kind, the Pannel retired, or
" ſtept backwards, as the Earl approached, and continued to point
" his Gun at him, deſiring his Lordſhip again to keep off, or by
" God he would ſhoot him; and a Servant near to the Earl, hav-
" ing begged of the Pannel for God's ſake to deliver his Gun, he a-
" gain refuſed, ſaying he had Right to carry a Gun; to which
" Lord *Eglintoun* anſwered, that he might have Right to carry a
" Gun, but not upon his Eſtate, without his Liberty. But the
" Pannel ſtill perſiſted in refuſing to deliver his Gun, and by
" ſtriking his Foot againſt a ſmall Stone, having fallen upon his
" Back, when retiring, and keeping his Gun pointed at Lord
" *Eglintoun*, as above deſcribed, the Muzzle of the Gun came
" thereby to be altered in the Direction from Lord *Eglintoun*, and
" to be pointed near ſtraight upwards; and Lord *Eglintoun*, who
" was only diſtant from the Pannel two or three Yards, having
" ſtopped or ſtood ſtill upon his falling, the Pannel, as ſoon as he
" could recover himſelf, and reſting upon his Arm or Elbow, aimed
" or pointed his Gun to the ſaid *Alexander* Earl of *Eglintoun*, and
" wickedly and felonioufly fired it at him, then ſtanding unarm-
" ed, ſmiling at his accidental Fall; and by the Shot he was
" wounded in the Belly, in a dreadful Manner, the whole Lead-
" ſhot in the Gun having been thrown into his Bowels; of which
" Wound the ſaid *Alexander* Earl of *Eglintoun* died that Night a-
" bout Twelve o'Clock."

The Libel further ſets forth, " That the Pannel, after perpe-
" trating ſo cruel, wicked, and barbarous a Crime, did immedi-
" ately run to one of Lord *Eglintoun*'s Servants, who had brought

" his

" his Gun from his Coach, and who was ſtanding at ſome Di-
" ſtance, and endeavoured to wreſt the Gun from him, but was
" prevented by the Aſſiſtance of another Servant; and when the
" two Servants were engaged with the Pannel, defending the
" Gun, and endeavouring to ſecure him, the Earl, who was then
" ſitting on the Ground, called to the Servants to ſecure the Man,
" for he had ſhot him, but not to uſe him ill, or uſed Words to
" that Purpoſe and Effect; and upon the Pannel's being brought
" near to Lord *Eglintoun*, he ſaid to him, *Campbell*, I would not
" have ſhot you."

" That the Pannel, when carrying from the Place where he
" committed the foreſaid Crime, to *Saltcoats* and *Irvine*, did ac-
" knowledge to ſundry Perſons, that he had wilfully and inten-
" tionally ſhot the ſaid Earl, and that the Earl, when within two
" or three Hours of his Death, in giving an Account to *John*
" *Muir*, Surgeon in *Glaſgow*, of what had paſſed betwixt the Pan-
" nel and him, did, in Subſtance, ſay, that the Pannel did take
" an Aim at him, and ſhot him wilfully."

" At leaſt, at the Time and Place above deſcribed, the ſaid *Alex-*
" *ander* Earl of *Eglintoun* was felonioufly murdered or bereaved of
" his Life, by a Wound he received from the Shot of a Gun, and
" of which Wound he died in about twelve Hours, or ſome ſhort
" Space thereafter; and the Pannel was Actor, Art and Part of the
" ſaid Murder." And the Libel concludes, " That all this, or
" Part thereof, being proved by the Verdict of an Aſſize, the Pan-
" nel ought to be puniſhed with the Pains of Law."

The Pannel having been brought to the Bar of the Court of Juſticiary, and having heard the foreſaid Indictment read, he denied the Libel, as laid; and, at the ſame Time, his Council ſtated the Facts on which they founded his Defence to the following Purport:

" That the Pannel, who is an Exciſe-officer, was in uſe to carry
" a Gun along with him, when he went out in queſt of Smug-
" glers, and that he ſometimes took a Shot when he met with any
" *Game* upon the Lands of certain Gentlemen in the Neighbour-
" hood, from whom he had that Liberty; That, about a Year
" ago, he went to the *Horſe Iſland* (a noted Place for Smuggling-
" veſſels) ſituated upon the Coaſt, about two Miles from *Saltcoats*;
" That, in returning from this Iſland, he took a Road for Foot-
" paſſengers, running through one of Lord *Eglintoun*'s Parks, and

" having

" having ſtarted a Hare, and having his Gun along with him, he " killed the Hare ; That he having been quarreled by the Earl " for ſo doing, he promiſed never to offend again ; and as he " knew that the Earl was ſtrict in preſerving the Game, and that " he frequently held Courts for the Purpoſe of proſecuting Poach- " ers, he was careful not to tranſgreſs ; and, accordingly, he even " gave away his Fiſhing-road, when he heard that his Lordſhip " had prohibited Fiſhing upon the Water of *Garnock*."

" That the Pannel, having a Licence to ſhoot on the Lands " of *Montfodd*, the Property of Dr. *Hunter*, lying to the North of " the Lands of *Ardroſſan*, the Property of the Earl; and hav- " ing met with *John Brown* on the Day libelled, they pro- " poſed to take their Courſe that Way, and went by the com- " mon Church-road, through the Grounds of one *Miller*, to- " wards *Montfodd*."

" That, having met with no Game, they reſolved to croſs over " to ſome riſing Grounds, from thence they could have a View " of the *Horſe-iſland;* from whence they went through the Lands " of *Montfodd*, paſſed over a ſandy Plain; and, when they came " towards the Property of Lord *Eglintoun*, in place of turning " down by the Sea-ſide, they kept a little higher, through the " Lands of *Ardroſſan*, the Property of the Earl, that they might " ſee the Iſland; after which they came down, and proceeded to- " wards the Shore."

" That, in their Way thither, they perceived a Coach at a little " Diſtance; and a Perſon having come up to them on Horſeback, " whom they diſcovered to be Lord *Eglintoun*.—His Lordſhip ac- " coſted the Pannel with great Paſſion, calling him *Scoundrel* and " *Raſcal*; aſked him how he preſumed to ſhoot on his Ground, " and demanded of him to deliver up his Gun; the Pannel was " amazed; told him, he had not fired a Shot that Day, and had " not been on his Ground with the Intention of killing Game. " The Earl, however, perſiſted; and the Pannel proteſted, and " ſaid, " Purſue me at Law, but I will not give up my Property," " or Words to that Import. The Pannel at the ſame time held " forward the Gun, *as the firm Indication of his Purpoſe* not to " part with it, and warned his Lordſhip not to perſiſt in the De- " mand. The Earl, however, puſhed forward, with an Inten- " tion to ſeize the Gun by Force. The Pannel retired, and the " Earl diſpatched his Servant for a Gun, ſaying he could ſhoot as

" well

" well as the Pannel. *Brown* thereupon took Fright, and retired " towards *Saltcoats*.

" That the Earl's Servant returned with a Gun, and was within " two or three Yards of his Lordſhip, when the Pannel having " fallen, his Gun unfortunately went off, and ſhot the Earl, who " was very near him.

" That the Servants did thereupon immediately attack the Pan- " nel, beat, and uſed him cruelly: That the Pannel, in his own " Defence, endeavoured to ſeize the Earl's Gun, but was prevented " by ſuperior Force."

The above is the Subſtance of the Facts which were ſtated on behalf of the Pannel; and from thence it was argued, 1*mo*, That the Pannel had no Intention to kill the Earl: That his Death was occaſioned by the Gun's having *accidentally* gone off, when the Pannel fell; and that, this being the Caſe, there was no juſt Ground for charging the Pannel with the Crime of Murder: That what happened was no other than Homicide, purely caſual, which meriteth no Puniſhment.

2*do*, It was pleaded that, ſuppoſing the Pannel had ſhot the Earl intentionally, yet the ſame was *juſtifiable*; 1*ſt*, In reſpect it was done upon juſt Provocation, which he undeſervedly received from the Earl. 2*dly*, In reſpect that it was neceſſary, in Defence of his Property. And, 3*dly*, In Defence of his Life.

3*tio*, It was pleaded, That, ſuppoſing the Pannel to have exceeded the *moderamen inculpatæ tutelæ*, in defending either his Property or his Life, he ought not to be puniſhed capitally, as for the Crime of Murder. And,

4*to*, It was maintained, That, as the Act did not proceed from premeditated Malice and Forethought, but was committed on a *ſuddenty*, *ex calore iracundiæ*, an arbitrary Puniſhment could only be inflicted.

The Court having ordained both Parties to give in Informations, in obedience thereto, this is offered on Behalf of the Proſecutors.

And as to the firſt Defence, *viz.* that the Homicide in this Caſe was merely *caſual*, the Gun having accidentally gone off, upon the Pannel's falling to the Ground, the Purſuers ſhall not diſpute, that the ſame, if proved, will be ſufficient to elide the Libel, in ſo far as it concludes for a capital Puniſhment, or the Pains of Law; but as an *Intention* to kill muſt be *preſumed*, where one Perſon kills

1ſt Defence, caſual.

 another

another with a lethal Weapon, eſpecially in the preſent Caſe, where it appears from the Facts as ſtated for the Pannel, that he declared a fixed and determined Reſolution to kill, if the Earl did not keep off, it will require a very ſtrong and pointed Proof to gain Belief, that the Shot immediately following theſe Threats was merely accidental; and however this Defence, if proved, might be ſufficient to exempt the Pannel from the Pains of Death, yet, as he was at any rate groſly culpable in having a loaded Gun confeſſedly placed in ſuch a Poſition, that if it ſhould accidentally go off, it could not fail to kill, the Pannel would unqueſtionably be liable to a very high arbitrary Puniſhment.

2d Defence, juſtifiable.

The ſecond Defence inſiſted upon for the Pannel was, that, ſuppoſing him to have intentionally killed the Earl, yet, as he had received high Provocation, the ſame was *juſtifiable*, at leaſt, that it ought to be available to free him, *a pœna ordinaria*; and this Provocation he was pleaſed to qualify in the following Manner, *viz.* that the Earl accoſted him with great Paſſion, calling him Scoundrel and Raſcal, and accuſing him of a Breach of Promiſe, whereas, from the Time he had made that Promiſe, he had never been upon the Earl's Ground with an Intention of killing Game.

This Averment of the Earl's having accoſted the Pannel with inſulting Language and opprobrious Names, is what the Purſuers do poſitively deny; the Indictment ſets forth very particularly the whole Converſation which paſſed between the Earl and the Pannel upon that Occaſion, and the Purſuers are confident no more will come out on Proof; but allowing, for Argument's ſake, that the Earl had expreſſed himſelf in the Words that are here alledged, there is no Relevancy in the Defence, and it is founded neither in Law nor in ſound Reaſon; and indeed, if ſuch a Defence was to be admitted, it would deſtroy the chief Purpoſe and Intendment of the Law, in inflicting the Pains of Death upon this cruel and unnatural Crime.

Murder is a Crime of ſo horrid an aſpect, and ſo ſhocking to human Nature, that even the moſt depraved Part of Mankind, when in cool Blood, will ſtartle at the Thoughts of committing it. It very rarely happens, that a Man goes coolly and deliberately to Work in murdering one of his Fellow-creatures. *Solon*, a great and wiſe Legiſlator, thought the Crime of Parricide ſo unnatural, that he conſidered it as an Affront to human Nature to ſuppoſe, that Mankind

kind could be guilty of it, and therefore made no poſitive Law againſt the Commiſſion of it; and, for the ſame Reaſon, if the Puniſhment of Murder was only to be confined to Caſes where it is coolly and deliberately perpetrated, the Safety of Society would ſcarce require a poſitive Law againſt the Commiſſion of it; ſo that the great Object of the Law was truly to curb the Paſſions of Mankind, and to prevent them from deſtroying one another, when roufed and heated, whether by Provocation, real or imaginary. It is the Duty of Mankind, who are endowed with rational Faculties, to curb and ſubdue their Paſſions, and to keep them within proper Bounds; and as Laws were made and became neceſſary, chiefly on account of the Depravity of Mankind, theſe Paſſions cannot afford a ſufficient Excuſe againſt the ordinary Puniſhment of an atrocious Crime. The Safety and Good of Society require, that the ordinary Puniſhment ſhould be inflicted, that Mankind may be cautious, and even when provoked, may keep a ſtrict Guard over their Actions, and curb and confine their Paſſions within proper Bounds.

It would therefore be highly inexpedient for the Peace and Safety of Mankind, to hold it as any Excuſe for the Commiſſion of an atrocious Crime, that the ſame was done when in the Heat of Paſſion or Anger, upon Provocation received; for, beſides, that there is no Proportion betwixt the Life of a Man, and any verbal Injury that poſſibly can be given, it is a Rule founded in the very Being and Exiſtence of Society, that no Man is at liberty to avenge his own Wrongs; and, as a verbal Injury already received, cannot be recalled, by killing the Perſon who gave the Injury; ſo the making it lawful, either to kill, or otherwiſe to puniſh the Perſon who gave the Injury, would be truly allowing Mankind to reſent and avenge their own Wrongs, which the Laws of no civilized State will ever permit, as it muſt neceſſarily tend to the Diſſolution of Society, and of all good Order and Government.

Accordingly, it is an Opinion, univerſally received among Lawyers, that no verbal Injury, which is all that is alledged in this particular Defence, is ſufficient to excuſe *a pœna ordinaria*, in the Puniſhment of the Crime of Murder.

This very Queſtion is ſtated by *Voet*, and reſolved in the following Words: " Proinde, ſi quis injuria quadam verbali provo- Lib. 48. tit. 8. § 9.
" catus, uſque adeo iræ indulgendum cenſuerit, ut ſtricto cultro,
" gladiove injuriantem occidat, vix eſt, ut ab ordinaria pœna ab-
" ſolvendus

" ſolvendus ſit, cum multum interſit inter verbales injurias et " atrociores reales, quarum hæ ſi præceſſerint, mitigationem pœ- " næ ſuadere poſſunt; illæ non item, quippe tam leves habitæ, ut " recantatione, deprecatione, ſimilibuſque modis ſecundum tra- " dita, in *tit. de injuriis*, evaneſcant."

Tit. Murder. §. 3. Sir *George Mackenzie* is alſo clearly of this Opinion, which he delivers in the following Paſſage: " It is alſo controverted amongſt " Lawyers, If, ſeeing Honour is as dear as Life, it be lawful to " kill him who aſperſes our Honour, as it is lawful to kill him " who aſſaults our Life; and, albeit *Farinacius* be of the " Judgment, that he who is thus provoked, being a Perſon of " far more eminent Condition than the Injurer, killing him is " not to be puniſhed as a Murderer, *ſed pœna extraordinaria, licet* " *injuria ſit verbalis*; yet, in my Judgment, he errs in that Po- " ſition; for, in effect, that is not Self-defence, (becauſe the ver- " bal Injury cannot be retreated nor retained), but it is *Revenge*; " yet *dolor juſtus aliquando operatur, ut pœna ordinaria temperetur.* " But yet that is not allowed in killing, and ſuch other Injuries, " which *non poſſunt revocari.*"

Matthæus in mentioning the Caſes where the ordinary Puniſh- ment ought not to be inflicted, makes no Mention of verbal Injuries, but confines it to thoſe real Injuries in which human Nature cannot be ſuppoſed to overcome the juſt Reſentment naturally ariſing againſt the Committers of them: " Eo amplius, et ſi dolo " malo homo cæſus ſit, tamen interdum pœna gladii remittitur; " nam qui impetu occidunt, et ſi dolo non carent, tamen ſi juſtus " dolor impetum concitaverat mitius puniuntur. Ita reſponſum " de marito qui occidit uxorem adulteram, *&c.*"

Tit. de ſicariis, cap. 3. § 4.

And although the Law of *England* has, in certain Caſes, been leſs ſevere in the Puniſhment of Homicide, than the Law of *Scotland*, and has accordingly eſtabliſhed a Diſtinction betwixt Murder and Manſlaughter, yet, it is there laid down as a general Rule, that a verbal Injury is in no Caſe ſufficient to acquit from the ordinary Puniſhment of Murder; eſpecially if the ſame was committed by a lethal Weapon.

This Doctrine is clearly laid down in a Book of great Authority in the Law of *England*, *viz.* a Treatiſe upon certain Branches of the Crown Law, by Mr. Juſtice *Foſter*. In treating of *Homicide*, *cap.* 5. § 1. he ſays, " That Words of Reproach, how grievous " ſoever, are not a Provocation ſufficient to free the Party killing

" from

" from the Guilt of Murder; nor are indecent provoking Actions " or Geſtures, expreſſive of Contempt or Reproach, without an " Aſſault upon the Perſon."

" This Rule will, I conceive, govern every Caſe where the Par- " ty killing upon ſuch Provocation, maketh uſe of a deadly Wea- " pon, or otherwiſe manifeſteth an Intention to kill, or to do " ſome great bodily Harm; but if he had given the other a Box " on the Ear, or had ſtruck him with a Stick or other Weapon, " not likely to kill, and had unluckily, and againſt his Intention, " killed, it had been but Manſlaughter."

" The Difference between the Caſes is plainly this; in the for- " mer the *malitia*, the wicked, vindictive Diſpoſition already men- " tioned, evidently appeareth, in the latter, it is as evidently " wanting. The Party, in the firſt Tranſport of his Paſſion, in- " tended to chaſtiſe for a Piece of Inſolence, which few Spirits " can bear; in this Caſe, the Benignity of the Law interpoſeth " in favour of human Frailty; in the other, its Juſtice regardeth " and puniſheth the apparent Malignity of the Heart."

" And it ought to be remembered, that in all other Caſes of " Homicide, upon ſlight Provocation, if it may be reaſonably " collected from the Weapon made uſe of, or from any other " Circumſtance, that the Party intended to kill, or to do ſome " great bodily Harm, ſuch Homicide will be *Murder*. The " Miſchief done is irreparable, and the Outrage is conſidered as " flowing rather from brutal Rage, or diabolical Malignity, than " from human Frailty; and it is to human Frailty, and to that " alone, the Law indulgeth in every Caſe of felonious Homi- " cide."

The very ſame Doctrine is laid down by Mr. *Blackſtone* in his Commentary upon the Law of *England*: " If a Man kills another " ſuddenly, without any, or without a conſiderable Provocation, " the Law implies Malice, for no Perſon, unleſs of an abandoned " Heart, would be guilty of ſuch an Act, upon a ſlight, or no ap- " parent Cauſe. *No Affront, by Words or Geſtures only, is a ſufficient* " *Provocation, ſo as to excuſe or extenuate ſuch Acts of Violence, as* " *manifeſtly endanger the Life of another*. But if the Perſon ſo " provoked, had unfortunately killed the other, by beating him " in ſuch a Manner, as ſhowed only an Intent to chaſtiſe, and " not to kill him, the Law ſo far conſiders the Provocation of Vol. IV. fol. 200.

" contumelious Behaviour, as to adjudge it only Manſlaughter, " and not Murder."

The ſame Doctrine is laid down by *Hawkins*, tit. *Murder* § 33.

Both the Law, and the Reaſon of it, are elegantly and diſtinctly pointed out by theſe Authors. The Law hath ſo far made an Allowance for the Frailty of human Nature, that where a Perſon has received a verbal Injury, he may retort it; and it will even afford an Alleviation of the Offence, ſuppoſing he ſhould proceed to a moderate Chaſtiſement; but as there is no Sort of Proportion betwixt a verbal Injury and the Life of a Man, which, when taken away, can never be reſtored, ſo, where a Perſon proceeds in reſentment of ſuch Injury, to imbrue his Hands in the Blood of any of his Fellow-creatures, the Law has moſt juſtly conſidered, that an Action ſo wicked and barbarous can only proceed from ſuch a Malignity of Heart and Depravity of Diſpoſition, as muſt render him a very unfit Member of Society, and a proper Object of that Vengeance which the Law has moſt juſtly inflicted upon the ſhedding of innocent Blood.

But it will be unneceſſary to inſiſt farther upon this Point, as it appears from the Facts, as ſtated by the Pannel himſelf, that it was not in a Heat of Paſſion, and in Reſentment of any Provocation the Pannel is ſuppoſed to have received, that the Earl was killed. The abuſive Language which the Earl is ſuppoſed to have given on the Occaſion, is ſaid to have happened upon the Earl's firſt accoſting the Pannel; ſo that, if it had been done in the Heat of Paſſion, on account of the Provocation received, it muſt naturally have happened when the Abuſe was given; whereas it appears, from the Pannel's own Showing, that he was not overcome with Paſſion upon the Occaſion; that he continued perfectly Maſter of himſelf; that he accordingly retired for ſome Time, and that upon the Earl's approaching near to him, the Pannel killed him, in proſecution of a fixed and determined Purpoſe and Reſolution.

And this leads the Purſuers to conſider what was in the next place offered on behalf of the Pannel, *viz.* that it was lawful for him to kill the Earl in defence of his Property.

Upon this Point, it was ſaid for the Pannel, that he had not been treſpaſſing upon the Earl's Property; that he was not upon his Grounds when the Earl attempted to ſeize his Gun; that he had

had not been upon them that Day with an Intention to kill Game; and that, although he had, yet the Law gave the Earl no Power to ſeize his Gun *brevi manu*, or to inflict any other Puniſhment upon him for the ſuppoſed Treſpaſs; that the Earl ought to have had Recourſe to a Court of Juſtice for inflicting the Penalties of the Law for the ſuppoſed Offence, and that this Point had been ſo determined by the Court of Seſſion, upon the 23d of *January* 1753, in the Caſe of Mr. *David Gregory*, Profeſſor of Mathematicks in the Univerſity of *St. Andrews*, againſt *Walter Wemyſs* of *Lawthocker*; and from the Premiſſes the following Concluſion was drawn, that as it was unlawful for the Earl to ſeize the Pannel's Gun, the Pannel was intitled to defend his Property againſt ſuch unlawful Attack, even at the Expence of the Life of the Invader; and this ought the more eſpecially to afford the Pannel a good Defence in the preſent Caſe, that he having been a Soldier, he could not conſiſtently with his *Honour*, ſurrender his Gun to any Perſon whatever.

Whether the Pannel's Conduct, on this Occaſion, was conſiſtent with the Laws of Honour, ſhall be afterwards conſidered; that it was highly inconſiſtent with the Doctrines and Precepts of Chriſtianity, cannot be diſputed. It is therein laid laid down, that " if " any Man will ſue thee at the Law, and take away thy Coat, let " him have thy Cloak alſo; and whoſoever ſhall compel thee to go " a Mile, go with him twain." The great Author of our Religion did thereby mean to teach Mankind, that it was more becoming the Dignity of human Nature to forgive Injuries than to reſent them, and to inculcate upon them the Suitableneſs of a Spirit of Meekneſs and Moderation, as moſt conducive not only to the private Happineſs of Individuals, but to the Peace, Quiet, and Good of Society; and that Injuries, which in their Nature are trifling and inconſiderable, ought much rather to be ſubmitted to, than to be made the Ground of Quarrel and Diſpute; and it muſt ſurely, at firſt ſight, appear very inconſiſtent with the foreſaid Doctrine, for any Man to maintain, that rather than part with the Poſſeſſion of a trifling Property (which, if unjuſtly taken from him, could eaſily be recovered) he ſhould think himſelf at liberty to take away the Life of one of his Fellow-ſubjects. Matth. v. 40, 41.

Indeed, without having Recourſe to any poſitive Law, either divine or human, the Purſuers may appeal to the common Feelings of Mankind, for a Determination of the preſent Queſtion. There

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is no Man who is poſſeſſed of any Spark of Humanity, or of any Notions of Right or Wrong, who muſt not at once declare that he would much rather ſurrender a Property, ten times the Value of that which was the Subject of Conteſt in this Caſe, than ſhed the Blood of the meaneſt, or of the moſt abject of the human Species.

As to the Pannel's Honour, which was much inſiſted upon in this Caſe, it is, with Submiſſion, rather too ludicrous to ſay, that a Man whoſe former Rank in Life was none other than that of a common Soldier, and who at preſent is an inferior Officer of Exciſe, was in Honour called upon rather to take away the Life of one of his Fellow-creatures, than to yield the Poſſeſſion of his Gun, which he could eaſily again have recovered, if it was unjuſtly taken from him. Indeed this Plea of Honour, which is not a *nomen juris*, is a very improper Topick to be urged before your Lordſhips as a Court of Law and of Juſtice. Your Lordſhips are not here to judge according to the falſe Notions and Punctilios of Honour that are commonly entertained amongſt a certain Set of Men; but whether in Law and in Juſtice, the Pannel was intitled to maintain the Poſſeſſion of his Gun at the Expence of the Life of one of his Majeſty's Subjects.

At the ſame time, the Purſuers will be pardoned to think, that if the Pannel was to be tried by a Court of Honour properly ſo called, he would likeways be condemned, and that it would be found, that he had not only acted a moſt illegal, barbarous and inhuman Part, but had behaved moſt *diſhonourably*. The Earl accoſted him defenceleſs and unarmed. If the Pannel had conſidered his Honour as injuriouſly attacked by the Demand which the Earl made to deliver up his Gun, he ought either to have laid aſide his Gun, and to have engaged with the Earl upon equal Terms, or he ought to have challenged him to ſingle Combat, and have waited till the Earl was properly armed for that Purpoſe. But when, in place of following that Courſe, (which might have been expected from one who pleads the Point of Honour) he pours a loaded Muſquet into the Bowels of a Man unarmed and totally defenceleſs; the Action muſt be condemned, not only as barbarous and cruel, but as moſt diſhonourable, by every Man who poſſeſſes the ſmalleſt Spark of Honour in his Breaſt. Honour, therefore, cannot avail the Pannel in this Caſe. The Point of Honour is much againſt him. And therefore the Purſuers ſhall leave that Topick, and conſider the Queſtion in this ſimple View, Whether

ther the Pannel was intitled to maintain the Poſſeſſion of his Gun at the Expence of the Earl's Life, ſuppoſing it to be true, but which was by no means the Caſe, that the Earl had either aſſaulted the Pannel, with an Intention to bereave him of his Gun, or had uſed any threatening Expreſſions, ſignifying his determined Reſolution ſo to do.

And, in the *firſt place*, the Purſuers beg leave to diſpute the Point of Law that was maintained upon the other Side, *viz.* That the Earl had not a Right to ſeize the Pannel's Gun. By Act 13, Parl. 1707, it is expreſly enacted, "That no common Fowler ſhall "preſume to hunt on any Grounds, without a ſubſcribed War-"rant from the Proprietors of the ſaid Grounds, under the Pe-"nalty foreſaid, beſides forfeiting their Dogs, Guns, and Nets, to "the *Apprehenders* or Diſcoverers."

It is humbly ſubmitted to your Lordſhips, If it is not implied in the very Words of this Statute, which forfeits the Dogs, Guns and Nets, to the *Apprehenders*, that it is lawful to ſeize the Dogs, Guns and Nets, *brevi manu*, from the Perſon found in the Tranſgreſſion. This, with Submiſſion, is the only Senſe and Conſtruction which can be put upon the Word *Apprehenders* in the foreſaid Statute; and as this is the natural Conſtruction of the Words, ſo it ſeems to be agreeable to the true Spirit and Intendment of the Statute, *viz.* by the immediate Seizure of theſe Inſtruments of Deſtruction in the Poſſeſſion of ſuch unqualified Perſons found *in reatu*, to prevent their being again uſed to the ſame unlawful Purpoſes, or their being ſecreted and otherways diſpoſed of, if allowed to remain in their Poſſeſſion, whereby the after Diſcovery of them might be attended with Difficulty: And therefore it would appear that the Legiſlature, from a Senſe of theſe Inconveniences, had, by the foreſaid Statute introduced this more ſummary and effectual Remedy, in permitting the Dogs, Guns and Nets to be *brevi manu* apprehended, in order to lay the Foundation for an after Conviction in a Court of Juſtice.

Neither is this any thing new in the Law; all the Statutes made againſt ſmuggling, authoriſe the Officers of the Revenue to begin with ſeizing the Goods, leaving it to be afterwards tried by the proper Court, whether they have been juſtly ſeized or not, and whether they ſhould be carried into Condemnation, or reſtored to the proper Owner.

And as to the Deciſion, *Gregory* contra *Wemyſs*, it is, in the firſt place, a ſingle Deciſion; and when the Queſtion does again occur, it would well merit to be reconſidered, eſpecially as the Statute has been univerſally underſtood in the Senſe now contended for by the Purſuers. It has from Time immemorial been a general Practice over the whole Kingdom, to ſeize Dogs, Guns, and Nets, without any previous Conviction, and until the foreſaid Caſe in the 1753, no Action of Damages or Reſtitution had ever been brought, on account of ſuch Seizures.

But, 2*dly*, The Deciſion, in the Caſe of *Gregory*, as it ſtands reported, does not appear to eſtabliſh the general Point. *Baird*, from whom the Gun was ſeized, was not Proprietor of the Gun, it belonged to Mr. *Gregory*, who was accompanied by *Baird*; and it does not appear from the Deciſion, that Mr. *Gregory* was not intitled to kill Game.

It is of no Moment, that the Pannel was not upon the Earl's Ground, but upon the Sea-ſhore, when his Gun was demanded; he had been upon the Earl's Property immediately before, under the Earl's own Obſervation; and as it muſt be preſumed, that he was there, with an Intention of killing Game, if he had found any, the Earl had the ſame Right to ſeize his Gun, as if he had got up with him before he left the Earl's Grounds, by ſtepping in upon the adjacent Sands.

The Purſuers, at the ſame time, apprehend, that it is very immaterial in the preſent Queſtion, whether the Earl, in ſtrict Law, had a Title, *brevi manu*, to ſeize his Gun or not. Was the Queſtion here ſimilar to that in Mr. *Gregory*'s Caſe, about Reſtitution of the Gun, as unlawfully ſeized, the Queſtion in Law, How far the Seizure was legal or not, would fall properly to be conſidered and determined; but, for the preſent Purpoſe, it is ſufficient to ſay, that it was univerſally underſtood, that the Guns of Perſons, who have neither Title nor Licence to hunt upon the Grounds of another, might be ſeized, *brevi manu*, and that, in fact, ſuch Seizures were generally made without any Complaint.

This is ſufficient to ſhow, *quo animo*, the Earl required of the Pannel to deliver his Gun. The Pannel could not but know, that the Earl did not intend to commit a Robbery, by violently and *feloniouſly* carrying off the Property of another, to which he had no Manner of Right, but that he acted only under the common Apprehenſion, that every Heritor had a Right to ſeize Dogs, Guns, and

and Nets, from unqualified Perſons hunting upon their Property, without any Licence. It is plain, that the Earl, if he had, *de facto*, ſeized and carried off the Gun, could not have been tried as guilty of Felony, even upon the Suppoſition, that, in ſtrict Law, he was not authoriſed to make the Seizure; the fartheſt it could have gone, would be only to found the Pannel in a civil Action for Reſtitution, or perhaps for Damages; and, when that is the Caſe, it is, with Submiſſion, clear, that the Pannel, in defending his Property againſt that Treſpaſs, was not intitled to take away the Life of the ſuppoſed Treſpaſſer.

It was indeed maintained on Behalf of the Pannel, that a Man was intitled to defend his Property to the laſt, even at the Expence of the Life of the Invader; and ſundry Authorities were appealed to, in ſupport of this general Propoſition, particularly, Grotius *de jure belli et pacis*, Lib. 2. Cap. 1. § 11, Puffendorf *de jure naturæ et gentium*, Carpzovius and others; but when theſe Authorities are attended to, none of them can avail the Pannel. Theſe Authorities do only apply to the Caſe where one's Property is *felonioufly* invaded; and when it cannot be otherwiſe ſecured than by taking away the Life of the Invader, which will never apply to the preſent Caſe, where the Attack made upon the Pannel was not with a felonious Intention, but where his Property was abſolutely ſecure, and could eaſily have been recovered, if the Earl had not a juſt Title both to ſeize and to hold it.

And it was a poor Reply that was made on the other Side, *viz.* that the Pannel was not obliged to ſubmit to the Expence of a Law-ſuit, in order to recover his Property; becauſe, if it ſhould be found, that the Earl was in the wrong, his Gun not only would have been reſtored to him, but the Court would have fully indemnified him of the whole Damages and Expences he could qualify, he had ſuſtained, by the illegal Seizure and Detention of his Gun.

The Pannel's Council did likewiſe appeal to *L.* 3. § 9. *ff. De vi et vi armata*; and alſo to *L.* 1. *Cod. unde vi*, but with what Propriety, the Purſuers are at a Loſs to diſcover. The firſt of theſe proves no more than this, That, where one is invaded with Arms, it is lawful for him to defend himſelf by Arms: And, as to the other Text, it proves no more than this, That a Man is entitled to defend his Poſſeſſion *moderatione inculpatæ tutelæ*, without defining the Bounds or Limits thereof; and the ſame Anſwer does occur to

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the Paſſage from Lord *Stair*, Fol. 174, and from the late Inſtitute, Vol. I. Fol. 512, § 31. No more is there ſaid, than that one may continue or recover his Poſſeſſion by Force *ex incontinenti*; but theſe learned Authors have no where ſaid, that it is lawful for the Perſon in Poſſeſſion, to kill the Perſon who endeavours to eject him; far leſs could it be maintained, that a Perſon was juſtifiable for killing, under the Circumſtances of the preſent Caſe, where the Perſon, in Poſſeſſion did not run the ſmalleſt Risk of loſing his Property, if he was entitled to hold it, and where the Perſon who is ſuppoſed to have attempted the Seizure, was totally defenceleſs and unarmed, and ſo, could not be ſuppoſed to intend Violence of any kind.

If the Earl had no Title to demand the Pannel's Gun, he might no doubt refuſe to deliver it up; and if the Earl had thereupon attempted to take it from him by Force, he might, perhaps, have been juſtifiable in ſtruggling to maintain his Poſſeſſion. But it is repugnant to Reaſon, and the common Feelings of Mankind, to ſay, that, under the Circumſtances of the Caſe, the Pannel was at liberty to bereave the Earl of his Life, rather than part with his Gun.

The Purſuers humbly apprehend, that, in ſound Law, and in Reaſon, no Man is entitled to kill, in Defence of his Property, unleſs where he is attacked with a felonious Intention to rob and bereave him of his Property; but where the Perſon who makes the Attack has clearly no felonious Intention, but only, under an erroneous Apprehenſion of his own Right, commits a Treſpaſs upon the Property of his Neighbour; and for which Redreſs can eaſily be had in a Court of Law, in ſo far as the Party has been injured; the Law of no civilized Country will, in theſe Circumſtances, allow a Perſon to kill another, under the Pretence of defending his Property.

The contrary Doctrine would lead to ſtrange and abſurd Conſequences. If killing was juſtifiable, in ſuch a Caſe as the preſent, a Perſon might be equally juſtified for killing, for every Treſpaſs that was made upon his Property. If it was lawful for the Pannel to kill the Earl, in order to prevent him from ſeizing his Gun, notwithſtanding he believed he had a Right to ſeize it, by the ſame Rule, the Earl might have been juſtified for killing the Pannel, in attempting to come upon the Earl's Lands, againſt his Will.

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Your Lordſhips know that, by the Statute 1686, it is lawful for every Proprietor or Poſſeſſor of Lands, *brevi manu*, to poind the Cattle found upon his Grounds, and detain them, until he be paid half a Merk for each Beaſt found in the Skaith. Now, let it be ſuppoſed, that the Heritor, in attempting to ſeize and poind, ſhould be reſiſted by the Proprietor of the Cattle, and that the Proprietor of the Grounds, from his not being preciſely acquainted with the Marches, ſhould attempt to poind ſome of theſe Cattle which were, *de facto*, not upon his Property, but upon the other Side of the March; is it poſſible to maintain, that the Proprietor of the Cattle, in order to prevent his Property from being unjuſtly carried off from him, would be juſtified in killing the Perſon making the Seizure? It is believed, that no Man would heſitate a Moment in declaring the Proprietor of the Cattle guilty of Murder, when it was plain, that the Proprietor of the Lands had no felonious Intention to bereave him of his Property; but had only been led to commit the Treſpaſs, upon an erroneous Apprehenſion of his own Right; and when, at the ſame time, the Cattle could be recovered by an Action at Law, with full Damage and Expences of Proceſs.

It is founded in the very Nature of Society and Government, that no Man is entitled to avenge his own Wrongs, or to take Juſtice at his own Hand, unleſs where the Laws of the Society cannot give him Relief. In this View, it may be lawful to defend himſelf againſt an irreparable Loſs, even at the Expence of the Life of the Aggreſſor. A Woman, for Example, may be juſtified for killing the Perſon who makes an Attack upon her Chaſtity, when ſhe cannot otherwiſe prevent the Violation of it; and, in like manner, it may be lawful, in Defence of one's Property, to kill a Robber who felonioufly endeavours to bereave him of it; becauſe, without ſo doing, his Property may be loſt. When the Robber has once carried off the Goods, it may not be in the Power of the Law to give the Perſon injured any Relief; but that will never apply to the Caſe in hand, and the other Caſes above mentioned, where there was clearly no felonious Intention, and where the Party ſuppoſed to be injured ran no Riſk of loſing his Property, which remained perfectly ſecure, and where, if he was in the right, the publick Law of the Land would give him full Indemnification and Relief.

The above Diſtinction is clearly pointed out by Numbers of Authorities. *Puffendorf*, in his Treatiſe *de jure naturæ et gentium*, after ſtating the Rights competent to Mankind in a State of Nature, proceeds as follows: "Aſt vero quod licet in naturali liber-
Lib. II. cap. 5. § 4. "tate viventibus, qui ſuam ſalutem propriis viribus, proprioque "ex judicio expediunt; id haud quaquam indulgetur illis, qui "in civitatibus degunt, et quidem imprimis adverſus ſuos cives. "Hi enim violentam ſui defenſionem adverſus cives perpetuos "aut temporarios ita moderari tenentur, ut eam tunc demum ad-"hibeant, quando tempus ac locus non ferunt auxilium magiſtra-"tus ad repellendam eam injuriam implorari, *qua vita vitæque* "*æquipollens, aut irreparabile damnum in præſentaneum periculum* "*conjicitur.* Et quidem, ut periculum tantummodo depellatur; "vindicta autem et cautio de non offendendo in poſterum magiſ-"tratus arbitrio relinquatur."

The Diſtinction already ſtated, is likewiſe pointed out by Mr. Juſtice *Foſter*, who, in the Treatiſe already mentioned, *on Homicide, cap.* 3. lays it down, that "in the Caſe of juſtifiable Self "defence, the injured Party may repel Force with Force, in de-"fence of his Perſon, Habitation, or Property, againſt one who "manifeſtly intendeth and endeavoureth, with Violence or Sur-"prize, *to commit a known Felony upon either.* In theſe Caſes he "is not obliged to retreat, but may purſue his Adverſary, till he "findeth himſelf out of Danger, and if in a Conflict between them "he happeneth to kill, ſuch killing is juſtifiable."

And in the ſame Chapter, he ſays, "Where a *known Felony* is "attempted upon the Perſon, be it to rob or murder, here the "Party aſſaulted may repel Force with Force, and even his Ser-"vant then Attendant on him, or any other Perſon preſent, may "interpoſe for preventing Miſchief; and if Death enſueth, the "Party ſo interpoſing will be juſtified. In this Caſe, Nature and "ſocial Duty co-operate."

And in cap. 5. § 4. he ſays, that "no Man under the Protec-"tion of the Law is to be the Avenger of his own Wrongs. If "they are of ſuch a Nature for which the Laws of Society will "give him an adequate Remedy, thither he ought to reſort."

The Diſtinction which the Purſuers have endeavoured to eſtabliſh, is clearly pointed out by this learned Judge. He, in ſtating, in what Caſes it is juſtifiable to kill in defence of Life and Property, confines it to the Caſe where a *known Felony* is attempted upon either,

either, by Robbery or Murder; but where the Attack made upon Property is of ſuch a Nature that the Law can give an adequate Remedy, the Perſon attacked is not intitled to avenge his own Wrongs, but he muſt reſort to the Courts of Law for Redreſs.

The very ſame Doctrine is laid down by *Blackſtone*, "If any Lib. IV. cap. "Perſon attempts a Robbery or Murder of another, or attempts 14. § 3. "to break open a Houſe in the Night-time, which extends alſo "to an Attempt to burn, and ſhall be killed in ſuch Attempt, the "Slayer ſhall be acquitted and diſcharged. This reaches not to "any Crime unaccompanied with Force, as picking of Pockets, "or to the breaking open of any Houſe in the Day-time, unleſs "it carries with it, an Attempt of Robbery alſo."

And *Hawkins* in his *Treat. of the Pleas of the Crown*, has the Lib. I. cap. following Paſſage: "Alſo it ſeems to be agreed, that no Breach of 31. § 33. "a Man's Word on Promiſe, *no Treſpaſs either to Lands or Goods*, "no Affront by bare Words or Geſtures, however falſe or ma- "licious it may be, and aggravated with the moſt provoking "Circumſtances, will excuſe him being guilty of Murder.—Who "is ſo far tranſported thereby, as immediately to attack the Per- "ſon who offends him, in ſuch a Manner, as manifeſtly endan- "gers his Life, without giving him Time to put himſelf upon his "Guard; if he kills in purſuance of ſuch Aſſault, whether the "Perſon ſlain did at all fight in his Defence or not; for *ſo baſe "and cruel a Revenge*, cannot have too ſevere a Conſtruction."

From the above Authorities, it is extremely plain (what indeed is ſtrongly founded in the Principles of right Reaſon) that no Man is at liberty to take away the Life of any of his Fellow-creatures, in the Defence of his Goods and Property, except where the Attack is made upon them with a felonious Intention; or, in other Words, where the Invader, by carrying off the Goods, would himſelf have been guilty of Felony; but that, where no more than a Treſpaſs is committed, and where the Party injured can have full and ample Reparation, by having Recourſe to Courts of Juſtice, the Perſon killing the Invader in ſuch Circumſtances, is guilty of the Crime of Murder, and will be juſtly ſubjected to a capital Puniſhment.

And indeed ſo anxious have the Laws of every well-governed State been to prevent Mankind, in a State of Society, from conſtituting themſelves the Judges and Avengers of their own Wrongs,

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that they are not permitted to kill any of their Fellow-creatures in Defence of their Property, even where the ſame is invaded with a felonious Intention, except where the ſame becomes abſolutely neceſſary, and the Laws of the Society unavailable to give them proper Reparation and Redreſs.

This Diſtinction is very clearly laid down in the Divine Law, which was delivered by *Moſes* to the *Iſraelites*: "If a Thief be "found breaking up, and be ſmitten, that he die, there ſhall no "Blood be ſhed for him. *If the Sun be riſen upon him*, there ſhall "be Blood ſhed for him, for he ſhould make full Reſtitution; if "he have nothing, then he ſhall be ſold for his Theft."

Exod. cap. 22. v. 2 and 3.

The ſame Rule is laid down in the Civil Law, and, particularly in *l. 9. ff. ad leg. Cor. de ſicariis*: "Furem *nocturnum* ſi quis "occiderit, ita demum impune feret, ſi parcere ei ſine periculo "ſuo non potuit." The general Rule among the *Romans* was, That a Thief might be ſlain by Night with Impunity, but that he could only be lawfully killed by Day, *ſi ſe telo defenderit*. And this Doctrine is laid down at great Length by *Julius Clarus*, *lib. 5. § Homicidium*, *No.* 47; and alſo by *Damhouderius*, *cap.* 78, *No.* 1, 2, 3. and many others, unneceſſary to mention particularly.

A Diſtinction was attempted to be made between avenging a Wrong already committed, and preventing the Commiſſion of a Wrong. The firſt was admitted to be unlawful, but the contrary was maintained as to the other.—But, with Submiſſion, the above Authorities ſhow clearly, that there is no Foundation for any ſuch Diſtinction, in ſo far as applicable to the preſent Caſe; for, when a Man exceeds the Bounds of Law and of Reaſon, in defending againſt a ſuppoſed Injury, he avenges his own Wrong, and, conſequently, falls under the Rules already laid down, and this muſt the rather obtain, in the preſent Caſe, where the ſuppoſed Injury had no real Exiſtence, but in the Pannel's own Imagination of what the Earl might poſſibly intend upon the Pannel's refuſing to deliver his Gun.

From what has been ſaid, it may be juſtly concluded, that the Pannel cannot juſtify himſelf from the Murder, with which he is charged, by alledging, that it was neceſſarily committed in defence of his Property. It has been ſhown, from various Authorities, and from the Reaſon of the Thing, that killing in defence of Property, cannot be juſtified, unleſs where the ſame was felonioufly invaded, and when, at the ſame time, his Property could not be otherwiſe ſecured.

ſecured. Whereas, in the preſent Caſe, it is plain, that the deceaſed Earl had no ſuch Intention. He could not have been charged as being guilty of Felony, if, *de facto*, he had ſeized and carried off the Pannel's Gun. He did not thereby intend feloniouſly to rob and bereave the Pannel of his Property. He was led to make the Demand, under the Belief and Apprehenſion, that the Law intitled him to make the Seizure. Whether he was right or wrong in that Apprehenſion, is to the preſent Iſſue very immaterial. If he was miſtaken, all that could be charged againſt him, if he had carried off the Gun, was a common Treſpaſs, upon which he might have been ſubjected in a civil Action, to reſtore the Gun, and to indemnify the Pannel of what Expences he ſhould incur in making his Claim effectual, and what Damages he could qualify he had ſuſtained by the Seizure or Detention. It is plain, that if the Gun had been taken from him, he ran no Riſk of loſing his Property. If he had a juſt Title to reclaim it, the Law was open, where he would get full Redreſs; ſo that it is impoſſible, that, with any Show of Reaſon or Juſtice, it can be maintained, that the putting the Earl to Death, was neceſſary, in defence of his Property.

And, as this Part of the Pannel's Defence muſt unqueſtionably be repelled, as utterly irrelevant, the other Part of the Defence, *viz.* that the Act was committed in the neceſſary Defence of the Pannel's Life, muſt ſhare the ſame Fate. The Relevancy of this Defence, the Purſuers do not diſpute, but it is utterly inconſiſtent with the Facts, as ſtated for the Pannel himſelf. It from thence appears, that no Violence or Injury of any kind was offered or threatened to the Pannel's Perſon. On the contrary, although the Earl had a Gun along with him in the Coach, he left it there unloaded, comes out and advances to the Pannel, altogether unarmed and defenceleſs, and asks of him to deliver up his Gun.

Nor is it a Circumſtance of any Moment, that the Earl at laſt called for his Gun, becauſe it is evident, from the whole Circumſtances of the Caſe, even as told by the Pannel himſelf, that the Pannel had no Reaſon to apprehend, that the Earl thereby meant to commit any Act of Violence upon the Pannel's Perſon, whatever Intention there may have been to deter and overawe the Pannel from putting his Threats in Execution, it is merely impoſſible, that the Pannel could be *conſtitutus in periculo vi-*

tæ, as the Earl ſtill continued unarmed and defenceleſs at the Time he received the fatal Wound; and, at any rate, had the Earl been in Poſſeſſion of his Gun at the Time, and that the Pannel had ſeriouſly believed, that the Earl therewith intended him Harm, he knew well that he could at any Time have ſaved himſelf, by delivering up his Gun, and which has been already ſhown he was not intitled to with-hold, at the Expence of the Earl's Life; his own Declaration referred to in the Indictment, will ſhow, that this is a *mere color quæſitus*, for that the Pannel neither was in any Danger of his Life, nor did apprehend himſelf to be in any ſuch; all that he pretends to have apprehended was, that the Earl might intend to take his Gun from him.

It was ſaid for the Pannel, that he and the Earl were upon very unequal Terms, for that he had been deſerted by his Companion, and left ſingle, whereas the Earl was attended with a numerous Train of Servants.

But this Circumſtance is, with Submiſſion, the worſt Apology which the Pannel could have offered for his Conduct. If he was truly apprehenſive, that bodily Harm was intended againſt him, his only Safety lay in keeping up his Fire,—when the Gun was diſcharged, he became defenceleſs, and could eaſily be overpowered by ſuch ſuperior Numbers, and therefore his unloading his Gun in the Earl's Bowels, affords of itſelf ſufficient Proof, that it was not done from any Apprehenſion of Danger to his own Perſon, but that it truly proceeded from the wicked Scheme, which, from the Beginning, he appears to have deliberately and firmly reſolved upon, *viz.* rather to bereave the Earl of his Life, than to part with his Gun, upon a falſe and groundleſs Apprehenſion, that the Earl meant to uſe Violence in depriving him of the Gun; and therefore, as, from the Facts as ſtated by the Pannel himſelf, it cannot be qualified, that either at the Time he gave the Earl the mortal Wound, or at any Time before, he was *in periculo vitæ conſtitutus*, that Part of the Pannel's Defence, in ſo far as it is founded upon Self-defence, will likewiſe fall to be repelled.

3d, Exceſs of the Moderamen, puniſhable arbitrarily.

It was, in the next place, pleaded for the Pannel, that although, in this Caſe, he had exceeded the *moderamen inculpatæ tutelæ*, either in defending his Life or Property, that yet he could not on that account be ſubjected to the *pœna ordinaria*, but that he would only fall to be puniſhed, *quoad exceſſum*, with an arbitrary Puniſhment.

But,

But, with all Submiſſion, there are not, in the preſent Caſe, *termini habiles* for this Queſtion. For, in order to intitle any Man to plead Self-defence to any Effect whatever, he muſt be able to qualify, that he was *in periculo vitæ conſtitutus*. If a Perſon was truly in imminent Hazard of his Life, and the Queſtion was, whether he could have extricated himſelf out of that Danger, without taking away the Life of his Adverſary, the Pannel might, in ſuch Caſe, plead with ſome Degree of Reaſon, that when his Life was truly in imminent Danger, and when he had killed, in order to relieve himſelf out of that Danger, he ought not to be puniſhed with the Pains of Death, becauſe it was poſſible he might have extricated himſelf, without going to the Extremity of killing the Perſon who threatened his Death; but, as it has been already ſhown, that the Pannel was at no Time in the ſmalleſt Hazard of his Life, or had the leaſt Reaſon to apprehend, that any Degree of Violence would be committed againſt his Perſon; and as, on the other hand, the Perſon whom he killed had threatened him no Harm or Violence, and was, at the Time, unarmed, and totally defenceleſs, it is impoſſible that there can be any room for enquiring whether, or how far, the Pannel had exceeded the *moderamen inculpatæ tutelæ*.—Such Exceſs does clearly ſuppoſe that he was acting in Defence of his Life, which has been already ſhown, could not have been the Caſe, as his Life, at no Time, was in the ſmalleſt Danger.

Neither is there any room for the Queſtion, whether the Pannel, in this Caſe, exceeded the *moderamen inculpatæ tutelæ*, in defending his Property. Such a Plea does neceſſarily imply, that it was lawful for him to defend his Property, at the Expence of the Life of the Invader. If the Earl could have been conſidered as a Robber making an Attack upon the Pannel, with a felonious Intention of robbing him of his Property, there might, in that Caſe, have been room for the Queſtion, whether the taking away of the Earl's Life was an Act abſolutely neceſſary for Defence of his Property, or, if his Property could have been ſaved without going to that Extremity; and, under theſe Circumſtances, there might have been room for the Pannel's maintaining, that he ought not to be puniſhed with the Pains of Death, becauſe he had gone farther than was ſtrictly neceſſary for preſerving his Property. But it has been already ſhown, that the Pannel, in this Caſe, was at no rate intitled to maintain Poſſeſſion of his Property at the Expence

of

of the Earl's Life; and, if ſo, there can be no room for conſidering whether he has been guilty of an Exceſs or not. It is plain, that he has felonioufly ſhed the Blood of an innocent Man, without any juſt Cauſe, and muſt therefore be ſubjected to that Puniſhment which the Law has inflicted upon the Commiſſion of ſo barbarous and unnatural a Crime.

4th Defence, no premeditated Malice.

It was pleaded for the Pannel, in the *laſt place*, that the Law made a Diſtinction betwixt Homicide committed upon premeditated Malice, and that which was committed upon Suddenty or *chaude melle*; that the latter could only be deemed a *homicidium culpoſum*, and not puniſhable by Death, and that as it could not be ſaid, that there was any premeditated Malice in this Caſe, but as the Earl was killed upon a ſudden Quarrel, in conſequence of Provocation given, that therefore the Libel fell to be reſtricted to an arbitrary Puniſhment; and it was ſaid, that the foreſaid Diſtinction took place in the Divine Law delivered by *Moſes* to the *Iſraelites*;—in the Civil Law;—in the Law of *England*;—and alſo in the Law of *Scotland*; and was accordingly likewiſe founded in the Practice of this Court.

Before conſidering the particular Laws here appealed to, the Purſuers muſt beg leave, in general, to premiſe, that it will be of no Moment to the Pannel how this Point ſtands by the Laws of other Countries, if the Diſtinction does not hold in the Law of *Scotland*. The Queſtions which have hitherto been treated, *viz.* How far it is lawful to kill in Defence of Life or Goods, depend on Principles which are founded in human Nature, and which being the ſame all the World over, the Law with regard to them, muſt in a great Meaſure be the ſame in every civilized State; and therefore in illuſtrating the municipal Laws of this Country in theſe Particulars, the Laws of other wiſe and civilized States may with great Propriety be appealed to; but as to the other Queſtion, *viz.* What Degree of Puniſhment ought to be inflicted upon the Commiſſion of this or the other Crime, there is no arguing with the ſame Propriety from the Law of one Country to that of another. The Intention of Puniſhment is to curb Vice, that Mankind in Society may live in Peace and Quiet, and be ſecured both in their Lives and Properties. Different Nations are, ſome more, and ſome leſs, addicted to different Vices; and therefore, in enacting Puniſhments, the different Tempers and Diſpoſitions of the People fall to be conſidered.

Thus,

Thus, among the *Romans*, Theft was not puniſhed capitally. It was there thought to be a ſufficient Check to the Commiſſion of that Crime to puniſh the Thief with the *reſtitutio quadrupli, in furto manifeſto, et dupli, in furto nec manifeſto*; and ſuch was likeways the Puniſhment of Theft by the *Jewiſh* Law: But among modern Nations this Puniſhment has been underſtood as inadequate to the Commiſſion of that Crime; and ſo in many Caſes it is puniſhed capitally. And therefore, although other Nations might not find it neceſſary to puniſh Homicide, without forethought Felony, with the Pains of Death, yet the *præfervidum Scotorum ingenium* might render it very neceſſary and expedient that Homicide, committed on Suddenty, and *in rixa*, ſhould be puniſhed capitally with us.

The Purſuers at the ſame Time apprehend, that the Diſtinction here attempted to be eſtabliſhed for the Pannel, did not take place, either in the Divine Law, or in that of the *Romans*, and does not obtain either in the Law of *England*, or, it is believed, in the Law of any well governed State. It was formerly obſerved, that the chief Intention of Puniſhment is to curb the depraved Paſſions of Mankind; and although the Perſon who calmly and deliberately meditates the Death of his Neighbour, and puts the ſame in Execution, is guilty of a more heinous Offence in the Sight of God, than he who in the Heat of Anger kills him ſuddenly; yet the latter appears to be more dangerous to Society than the former. The moſt wicked Man muſt ſtartle at the Thought of a deliberate Murder, and therefore it will be but ſeldom or rarely committed; and as the other happens much more frequently, it becomes neceſſary and expedient to inflict the higheſt Puniſhment upon the Commiſſion of it, that Mankind may thereby be deterred from falling into the Crime, and may be led to keep a ſtrict Guard over themſelves, and curb and confine their Paſſions, within proper Bounds.

In order to ſhow that the above Diſtinction did obtain in the Divine Law, the Council for the Pannel did appeal to *Chap.* 21. *ver.* 13, *of Exodus*, where it is ſaid, " And if a Man lie not in wait, " but God deliver him into his Hand, then I will appoint thee a " Place whither he ſhall flee."—And to *Chap.* 35 *of Numbers*, *ver.* " 22, 23, *and* 24, where it is ſaid, " If he thruſt him ſuddenly, " without Enmity, or have caſt upon him any thing, without lay- " ing of wait, or with any Stone wherewith a Man may die, *ſeeing*

" *him not*, and caſt it upon him, that he die, and was not his E-
" nemy, neither ſought his Harm, then the Congregation ſhall
" judge between the Slayer and the Revenger of Blood, according
" to theſe Judgments."

But, with all Submiſſion, the Texts here appealed to do by no means prove what is intended to be eſtabliſhed by them. It is clear from the Texts themſelves, that the Manſlayer was only intitled to the Benefit of the City of Refuge, where the Slaughter was purely caſual, or by Misfortune, without any Intention to kill. This is plainly the Meaning of the Words in *Exodus*, " If a Man lie not in " wait, but God deliver him into his Hands." Theſe Words can with no Propriety be applied to the Caſe of Homicide intentionally and wilfully committed, although the Intention *non antecedit congreſſum.*

Indeed this Matter is clearly explained in the foreſad *35th Chapter of Numbers*, *ver.* 16, 17, *and* 18, compared with *ver.* 21. In the three firſt Verſes it is ſaid, that he who ſmites with an Inſtrument of Iron, or who ſmites with throwing a Stone, or with a Hand-weapon of Wood, wherewith a Perſon may die, and he die, he is a Murderer, and the Murderer ſhall ſurely be put to Death. But in *ver.* 21, it is ſaid, that " If *in Enmity* he ſmite him with his " *Hand*, that he die, he that ſmote him ſhall ſurely be put to " Death; for he is a Murderer."

Your Lordſhips will here obſerve, that, where the Stroke is given with a Weapon not deadly, and from which there was no Reaſon to apprehend that Death would enſue, previous Enmity muſt appear, in order to puniſh the Killer as a Murderer; but where the Stroke is given with a deadly Weapon, and Death did enſue, there was no Neceſſity to prove any previous Enmity. The ſtriking with a lethal Weapon did preſume an Intention to kill; and the Perſon killing, under theſe Circumſtances, was to be held as a Murderer; and there was no Neceſſity to prove that the ſame proceeded from premeditated Malice. An Intention to kill is to be preſumed; and it was ſufficient that the Intention *antecedit ictum, licet non congreſſum.*

It is from thence plain, that Slaughter, upon Suddenty, even without Forethought or previous Enmity, was capital by the Law of *Moſes*, if the Wound was given with a lethal Weapon; and that the Caſes mentioned in the foreſaid Texts do plainly allude to Homicide, merely caſual; and which is clearly ſo expreſſed in

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the foreſaid Texts of *Exodus*, and alſo in the other Text in *Numbers*, where the Caſe is ſtated of *killing by throwing a Stone, ſeeing him not*, which can never apply to the Caſe of intentional Homicide.

And that the Benefit of thoſe Cities of Refuge was only given to thoſe who committed Homicide merely caſual, or by Misfortune, without any Intention to kill, is ſtill more clear from *Deuteronomy*, Cap. 19. Ver. 4 and 5. " And this is the Caſe of the " Slayer which ſhall flee thither, that he may live; whoſo killeth " his Neighbour ignorantly, whom he hated not in Time paſt; as " when a Man goeth into the Wood with his Neighbour to hew " Wood; and his Hand fetcheth a Stroke with the Ax to cut " down the Tree, and the Head ſlippeth from the Helve, and " lighteth upon his Neighbour that he die, he ſhall flee into one of " theſe Cities, and live."

The Example here given, for illuſtrating the Text, proves, in the cleareſt Manner, that thoſe only who committed Homicide purely caſual, were entitled to the Benefit of the Cities of Refuge.

Nor is it of any Moment, what was obſerved on the other Side, that it was abſurd to ſuppoſe that an innocent Perſon ſhould be obliged to fly into a City of Refuge. The Reaſon thereof is explained in the ſubſequent Verſe; " Leſt the Avenger of the Blood " purſue the Slayer while his Heart is hot, and overtake him." The *Jews* were prone to Revenge, and, therefore, the Sanctity of theſe Cities of Refuge was conſidered as neceſſary for protecting the Perſon who had ſhed Blood from the Reſentment of the Friends of the Perſon killed.

The Pannel, in the next Place, endeavoured to ſhow, that, in the Civil Law, a Diſtinction was eſtabliſhed betwixt Homicide, flowing from premeditated Malice, and that committed on Suddenty, and that the latter was not puniſhed capitally; but the Purſuers, after making all the Searches they can into that Law, cannot diſcover, that there is the leaſt Foundation for the Diſtinction; on the contrary, whoever committed Homicide *dolo malo*, whether deliberately, and upon Forethought, or of Suddenty, was to be puniſhed *lege Cornelia de ſicariis.*—*Dolus malus* is, by the Law of every Country undoubtedly eſſential to conſtitute the Crime of Murder; but, it was ſufficient, by the *Roman* Law, as well as by the Laws of every other Country known to the Purſuers,

ſuers, that the Intention to kill, *antecedit ictum, licet non congreſſum.*

Intention, or the Act of the Mind, can only be known from external Circumſtances; and, ſo the general Rule laid down in the Civil Law was, that, if the Perſon killing ſtruck with a mortal Weapon, and Death followed, he was juſtly held as a Murderer. "Si gladium ſtrinxerit, et in eo percuſſerit, indubitate "occidendi animo id eum admiſiſſe, *l.* 1. § 3. *ff. ad legem Cor-* "*neliam de ſicariis.*" Here the Law does not require, that premeditated Malice ſhould be proved; but, where Death happens, by a Wound given with a lethal Weapon, the Law has laid it down, that it is to be preſumed, that it was done with a felonious Intention; and, as therefore, it muſt be conſtructed as voluntary Slaughter, done *dedita opera*, the Actor ought to be puniſhed capitally; and, it was ſufficient, that the Stroke was given with a murderous Intention, although that Intention did not take its Riſe from *premeditated* Malice.

This Doctrine is accordingly clearly laid down by *Voet. ad leg. Corn. de ſicariis*, § 9. *circa med.* After ſetting forth, that the Huſband who killed his Wife found in the Act of Adultery, was not to be puniſhed capitally, he proceeds in theſe Words: "Cumque "hoc ita in marito, per graviſſimam adulterii injuriam concitato, "*jure ſingulari* conſtitutum ſit, ad alios, aut ſubito atque ſponta- "neo iræ impetu concitatos, aut injuria leviore ad iram commo- "tos, atque ita adverſarium occidentes, porrigendum non eſt; "ſed potius ad ordinariam hi legis Corneliæ pœnam revocandi "forent. Licet enim diſtincta hæc ſint, impetu et propoſito de- "linquere, non tamen ideo illi qui impetu delinquunt, extra "dolum ſunt; quod uti probatum antea de iis qui per ebrieta- "tem peccarunt. Ita etiam in illis, qui iracundiæ calore ſtimula- "ti, cædem perpetrarunt, verum eſt, dum et in ira, neque judi- "cium, neque aſſenſus animi, neque voluptas, deeſt."

Your Lordſhips will likeways obſerve, from a Paſſage formerly recited from the ſame learned Author, that no Provocation by Words is ſufficient to excuſe *a pœna ordinaria;* and it is extremely plain that Homicide committed upon ſuch Provocation is underſtood to proceed from a ſudden Heat of Paſſion, and not from premeditated Malice.

The *l.* 1. § 3. *ff. ad leg. Corn. de ſicariis*, was appealed to on behalf of the Pannel. It is in the following Words: "Divus Ha-

"drianus

" drianus reſcripſit, eum qui hominem occidit ſi non occidendi " animo hoc admiſit abſolvi poſſe ; et qui hominem non occidit, " ſed vulneravit aut occidat pro homicida damnandum, et ex re " conſtituendum hoc, nam ſi gladium ſtrinxerit, et in eo percuſſe- " rit, indubitate occidendi animo id eum admiſiſſe. Sed ſi clavi " percuſſet, aut cucuma in rixa quamvis ferro percuſſerit, tamen " non occidendi animo, leniendam pœnam ejus, qui in rixa caſu " magis quam voluntate homicidium admiſit." And they further appealed to *l.* 1. *cod. dict. tit.* which is in the following Words : " Frater veſter rectius fecerit, ſi ſe præſidi provinciæ obtulerit, qui " ſi probaverit non occidendi animo hominem a ſe percuſſum eſſe, " remiſſa homicidii pœna, ſecundum diſciplinam militarem ſenten- " tiam proferet. Crimen enim contrahitur, ſi et voluntas noſcen- " di intercedat, cæterum ea quæ ex improviſo caſu potius quam " fraude accidunt, fato plerumque non noxæ imputantur.

But it is, with Submiſſion, inconceivable how the Pannel can expect to receive any Aid from theſe Authorities : On the contrary, when they are duly conſidered, they eſtabliſh the very Doctrine which the Purſuers are endeavouring to maintain. Your Lordſhips will obſerve, that the Ideas of the *Jewiſh* Law, above ſtated, are here adopted. Where the Perſon killing ſtruck with a Weapon from which he had no Reaſon to apprehend that Death would follow, and where no previous Enmity betwixt the Parties did appear, or could be alledged, ſo that, upon the whole, no Intention to kill could be preſumed, the Law hath ſaid, that in ſuch Caſes the Puniſhment ought to be mitigated; but then the very ſame Law hath ſaid, that where the Perſon ſtruck with a lethal Weapon, Malice and Intention to kill muſt unqueſtionably be preſumed, " ſi gladio percuſſerit, indubitate occidendi animo id eum " admiſiſſe." And as in this Caſe the Pannel killed the Earl by pouring a loaded Muſket into his Bowels, it is impoſſible to doubt, and the Law does preſume, that it was done with the felonious Intention of bereaving the Earl of his Life ; and, of Conſequence, nothing leſs than a capital Puniſhment can, with any Shew of Reaſon or Juſtice be inflicted upon him.

The Purſuers ſhall not trouble your Lordſhips with running over any of the other Authorities that were ſtated for the Pannel upon this Point. What has been ſaid affords a ſufficient Anſwer to all and each of them. They only reſpect the Caſe where Homicide is committed in a Fray, and where, from the Weapons that were

uſed, and the Circumſtances of the Caſe, it does not appear that the Party had an Intention to kill, the very contrary of which was clearly the Caſe of this Pannel.

With reſpect to the Law of *England*, after what has been already ſaid upon another Branch of the Defence, it will be unneceſſary to trouble your Lordſhips with much more upon it. The Purſuers apprehend, that the Law of *England* is clearly againſt the Pannel upon this Point, and that, were he to be tried in *England*, and the Indictment proved againſt him, he would be found guilty of Murder, and puniſhed with the Pains of Death.

The Law of *England* has ſo far interpoſed in favour of human Frailty, that where a Perſon, in a ſudden Tranſport of Paſſion, upon juſt Provocation received, kills his Neighbour, the ſame is differenced from Murder, and is only to be puniſhed as Man-ſlaughter. But your Lordſhips will obſerve, that taking the Facts even as ſtated by the Pannel, he cannot poſſibly bring himſelf under that Predicament. It from thence appears, that it was not in the Heat of Paſſion, and in Reſentment of Provocation given, that the Earl was killed; but, on the contrary, it does appear, that the Pannel was perfectly Maſter of himſelf upon the Occaſion; that he accordingly, for ſome Time, retired from the Earl with the Muſquet preſented, and ready to be diſcharged; and that it was upon the Earl's approaching near to him, that the Pannel killed him in proſecution of a determined Purpoſe and Reſolution, upon no account to quit his Gun. It is a Queſtion toſt by the Writers upon the Law of *England*, what Time may be preſumed ſufficient for a Man to cool, ſo as to render the Crime wilful and intentional Murder; but there is no room for that Queſtion here, as it is clear from the Pannel's own ſhowing, that he was never heated; that he was all along perfectly Maſter of himſelf, and that the Act he committed was not the Reſult of his being overcome by a ſudden Guſt of Paſſion; but that it was truly the Reſult of a fixed, determined, and deliberate Purpoſe. Every Caſe muſt be determined upon its own Circumſtances; and it is humbly ſubmitted, if the Circumſtances above noticed, all ariſing from the Pannel's own State of the Facts, are not ſufficient to bring the Crime, according to the Ideas of the Law of *England*, under the Denomination of *wilful Murder*.

But, 2*do*, Your Lordſhips will obſerve, that, independent of theſe Conſiderations, an eſſential Ingredient is here wanting, in order

der to render the Crime Man-ſlaughter. The only Provocation the Pannel is alledged to have received, was merely verbal; the Earl was all the Time unarmed, and never touched the Pannel's Perſon.

This Circumſtance alone, is, by the Law of *England*, ſufficient to render this Crime Murder, and not Man-ſlaughter. If the Earl had made an actual Aſſault upon the Pannel's Perſon, and if a Tuilzie had thereupon enſued, and the Earl had been killed, there might have been a Pretence for pleading, that the Pannel, by the Law of *England*, would only have been guilty of Man-ſlaughter. But it appears from the Authority of Mr. Juſtice *Foſter*, *Blackſtone* and *Hawkins*, ſtated in a former Part of this Information, that no verbal Injury, how grievous ſoever, is ſufficient to free the Party killing from the Guilt of Murder, if the Death was occaſioned by a lethal Weapon. If the Perſon provoked by a verbal Injury, ſhould, in return thereof, have ſtruck with a Weapon, not likely to kill, an Intention to kill could not neceſſarily from thence be inferred; and the killing in ſuch Caſe might be ruled Man-ſlaughter only. The Law of *England*, in this Particular, ſeems to be founded upon the very ſame Ideas with that of the *Jews* and of the *Romans*, already mentioned. But, where the Wound is given with a lethal Weapon, as in this Caſe with a Gun, which muſt neceſſarily preſume an Intention to kill, the Caſe, by the Law of *England*, would be ruled Murder, becauſe no verbal Provocation whatever is ſufficient to free the Party from the Guilt of Murder, and ſo where, upon a verbal Provocation, Homicide happens; and where the killing appears clearly to have been intentional, the Law in ſuch Caſe rules it to be Murder.

Sundry Caſes might be ſtated from the Law of *England*, for illuſtrating the Difference betwixt Murder and Man-ſlaughter; but it will be unneceſſary to trouble your Lordſhips with any of theſe in the preſent Caſe. The general Principles above laid down are uncontroverted, and are clearly ſufficient for determining the preſent Queſtion.

It was, in the laſt place, maintained upon the Part of the Pannel, that the Diſtinction already ſtated betwixt Murder committed upon Forethought, and Homicide committed upon Suddenty, took place in the Law of *Scotland*; that the former only was capital, but that the latter, as being only *homicidium culpoſum*, was

to be puniſhed arbitrarily; and that, as this Diſtinction took place in the old Law of *Scotland*, ſo it was not taken away by the Statute 1661.

But the Purſuers humbly apprehend, that this Diſtinction is not founded in the Law of *Scotland*; that, at no Period, wilful Homicide, though committed without forethought Felony, and Premeditation, was puniſhed arbitrarly; and that if ever the Law ſtood otherwiſe, it was clearly ſo far altered by the Statute 1661.

With reſpect to the firſt Point, it appears from ſundry of our old Statutes, that wilful and intentional Homicide was at all Times puniſhed with Death, without Diſtinction. By *Chap.* 3. *1ſt Statute of* Robert I. intituled, "Men condemned to the Death ſhould "not be redeemed," It is ſtatute and ordained, "Gif any Man, "in any Time coming or bygane, what Condition or Eſtate he be, "is convict or attainted of Slaughter, Reif, or of any other Crime "touching Life and Limb, common Juſtice ſhall be done upon "him, without any Ranſom, ſaving the King's Power, and alſo "the Liberties, ſpecially given and granted be the King that now "is, and his Predeceſſors, to the Kirk and Kirkmen, and other "Lords."

Here ſlaughter in general is mentioned, and Juſtice was to be done upon the Perſon convicted or attainted of it; and the Puniſhment by the Title was plainly Death, ſo that by the Law of *Scotland*, Slaughter in general was capital, without Diſtinction.

By Chap. 43. of the Statute of King *Robert* III. it is ſtatute, "That nae Man uſe any Deſtruction, Hairſhips, Burning, Reif, "*Slaughter* in Time to come, under the Pain of Tinſel of Life "and Goods moveable."

Here the Pain of Death is likewiſe declared to be the Puniſhment of Slaughter in general, without Diſtinction. And in the immediate ſubſequent Chapter, the Sheriff was to take diligent Inquiſition of Deſtroyers of the Country, or ſuch as had deſtroyed the King's Lieges with Heirchippis, Slaughter, *&c.* and was to take Bail from them, if arreſted, to compear at the nixt Juſtice *Aire*; and, if Bail was not given, the Sheriff was to put him to the Knowledge of an Aſſize; and gif he be taint with the Aſſize for ſick an Treſpaſſon, he ſhall be condemned to Death. This can only relate to Man-ſlaughter, and not to Murder, upon forethought Felony, which was one of the Pleas of the Crown, to be tried only before the King's Juſticiar, whereas Slaughter might be tried by the

the Sheriff, where there was a certain Accuſer, as appears from *Book* 1. of the *Majeſty*, *Cap.* 1. § 8.

In like manner, the Cap. 2d of the Statutes of *Alexander* II. does plainly preſuppoſe, that Slaughter, without Diſtinction, was capital; and, accordingly, *Skene*, in his Treatiſe of Crimes, Tit. 2. Cap. 6. a Book of the higheſt Authority, lays it down, " That Man-ſlaughter, " committed voluntarily, be forethought Felony, or caſually by " *chaude melle*, generally is puniſhed by Death, and Confiſcation of " the moveable Goods pertaining to the Treſpaſſer; ſo that the " Girth or Sanctuary is nae Refuge to him who commits " Slaughter be forethought Felony; but he ſhould be delivered to " the Judge-ordinary, to underlie the Law."

Here it is plainly laid down, that Man-ſlaughter, whether committed by forethought Felony, or on Suddenty, is puniſhed with the Pains of Death; with this Difference, that the Girth or Sanctuary was no Refuge to him who commits Slaughter by forethought Felony, but he was to be delivered to the Judge-ordinary to underlie the Law; which is expreſly enjoined by Act 23, Parliament 4 *James* V. whereby Maſters of the Girth are ordained to deliver up to Juſtice, to underlie the Law for their Crime, ſuch Perſons as are guilty of Murder, upon forethought Felony.

It was upon this Statute, and others to the ſame Purpoſe, that the Council for the Pannel endeavoured to eſtabliſh a Diſtinction betwixt Man-ſlaughter upon forethought Felony, and ſuch as was committed on Suddenty. They contended, That, as the Maſters of the Girth were directed and ordained to deliver up to Juſtice, ſuch only as were guilty of Murder upon forethought Felony, that therefore Homicide, committed on Suddenty, was not capital.

But the Purſuers do humbly beg leave to maintain, that the Concluſion does by no means follow from the Premiſſes; for altho' Murder, in every Degree, does juſtly merit the Pains of Death, yet Murder, as well as other Crimes, does admit of different Degrees of Aggravation; and indeed there can be no doubt, that the Man who coolly and deliberately meditates the Death of his Neighbour, and executes his Purpoſe accordingly, is more criminal in the Sight of God, than the Perſon who, in a ſudden Start of Paſſion, puts his Neighbour to death; and, therefore, all that is proved by thoſe Statutes is no more than this, that thoſe who were guilty of Murder, ſo aggravated, were not entitled to the Benefit of the

Sanctuary, but the Maſters and Keepers thereof were bound to deliver them up to Juſtice; whereas thoſe who were only guilty of Murder upon Suddenty were entitled to the Benefit of the Sanctuary, and could not be delivered up.

And it will by no means from thence follow, that, becauſe the Girth or Sanctuary was a Protection to them from Puniſhment, that therefore, if they did not reſort to the Sanctuary, they were not puniſhable; or that the Pains of Death were not to be inflicted, in caſe they were apprehended and convicted, before retiring to the Sanctuary. The Council for the Pannel adduced no Authority to prove this; and yet, unleſs they prove this, they plainly prove nothing. There is no Inconſiſtency in ſuppoſing that a Crime ſhould be capital, and at the ſame time there ſhould be a Sanctuary which afforded the guilty Perſon a Protection againſt Puniſhment; and, indeed, it clearly appears from Cap. 6 of the Statutes of *Alexander* II. That Criminals, who reſorted to, and took Sanctuary in, Churches, had Protection, though their Crimes were capital. It is there ſtatute, " Anent Thieves and Riefers, who flys to Haly-kirk, " that, gif any of them, moved with Repentance, confeſſes there " that he has heavily ſinned, and, for the Love of God, is come " to the Houſe of God for Safety of himſelf, he ſhall have Peace " in this Manner, that is, that he *ſhall not tyne Life nor Limb*, but " what he hath taken frae any Man he ſhall reſtore ſae meikle to " him, and ſhall ſatisfy the King, according to the Law of the " Country, and ſua ſhall ſwear, upon the Holy Evangil, that there- " after he ſall never commit Reif nor Theft." And, in the laſt Paragraph of that Chapter, it is ſaid, " Mairover, *Man-ſlayers*, " Traitors to their Maſters, and they who are challenged of Mur- " der or Treaſon, ſall be lawfully accuſed thereanent, and gif they, " in manner foreſaid, fly to the Kirk, the Law aforeſaid ſall be " kept and obſerved to them."

It is from this Statute plain, that the Girth or Sanctuary was a Protection to Criminals who had committed the moſt atrocious Crimes, and ſuch which were clearly puniſhed capitally. There can be no doubt, that thoſe guilty of Murder or Treaſon were, at the Period of the foreſaid Statute, liable to be puniſhed capitally, if they did not fly to holy Kirks, and therefore, although by ſubſequent Statutes, thoſe guilty of aggravated Murder, *viz.* ſuch as was committed upon forethought Felony, were deprived of the Benefit of the Sanctuary, yet all other Crimes remained upon their former

former footing. What were capital before, remained capital ſtill, and ſuch as were guilty thereof, if they did not fly to the Sanctuary, could be capitally puniſhed. And accordingly Sir *George Mackenzie*, in his Obſervations upon Act 90, Parl. 6. *James* I. expreſly lays it down, " That Murder, though committed with-
" out forethought Felony, is puniſhable by Death, except it was
" either caſual or in Self-defence, and then it is called properly
" Homicide, or Manſlaughter."

But it is unneceſſary to make any further Enquiry how the Law of *Scotland* ſtood in this Particular in ancient Times, becauſe, with Submiſſion, it cannot admit of a Doubt, that ſince the 1661, the Committers of wilful Homicide, are liable to a capital Puniſhment, without Diſtinction, whether it was committed upon Forethought or upon Suddenty.

The Act 22, Parl. 1661, " For removing of all Queſtion and
" Doubt that may ariſe hereafter in criminal Purſuits for Slaugh-
" ter, ſtatutes and ordains, that the Caſes of Homicide after fol-
" lowing, *viz.* caſual Homicide, Homicide on lawful Defence,
" and Homicide committed upon Thieves and Robbers, breaking
" Houſes in the Night, or in caſe of Homicide, the Time of
" maſterful Depredation, or in the Purſuit of denounced or decla-
" red Rebels for capital Crimes, or of ſuch who aſſiſt and defend
" the Rebels, and maſterful Depredators by Arms ; and by Force
" oppoſe the Purſuit and apprehending of them, which ſhall hap-
" pen to fall out in time coming, nor any of them ſhall not be
" puniſhed by Death ; and that notwithſtanding of any Laws
" and Acts of Parliaments, or any Practique made heretofore, or
" obſerved in puniſhing of Slaughter. But that the Manſlayer,
" in any of the Caſes aforeſaid, be aſſoilzied from any criminal
" Purſuit purſued againſt him, for his Life, for the ſaid Slaughter,
" before any Judge criminal within this Kingdom, providing al-
" ways, that in the Caſe of Homicide caſual, and of Homicide
" in Defence, notwithſtanding that the Slayer is by this Act free
" from capital Puniſhment, yet it ſhall be leiſome to the criminal
" Judge, with Advice of the Council, to fine him in his Means, to
" the Uſe of the Defunct's Wife and Bairns, or neareſt of Kin,
" or to impriſon him."

One of the Pannel's learned Council was pleaſed to obſerve, that the Word *caſual*, which occurs in this Statute, was not an *Engliſh* Word, that it was to be found in no *Engliſh* Dictionary, and

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by giving it a *Latin* Derivation, he endeavoured to ſhow, that it was broad enough to comprehend the Caſe of *wilful* Homicide, committed without forethought Felony.

The Purſuers ſhall not trouble your Lordſhips with following the Pannel's learned Council in his many ingenious Criticiſms. It is ſufficient to ſay, that the Word *Caſual* is well known in the Language of the Law of *Scotland*, and muſt have been underſtood by the Legiſlature when uſed in the aforeſaid Statute; and that it is equally well known in the Language of our neighbouring Country, appears from moſt of the *Engliſh* Dictionaries, and particularly, *Johnſon*'s; and therefore the Criticiſms built upon this capitalMiſtake muſt all fall to the Ground. The Purſuers ſhall not enter into a critical Examination of the Derivation of the Word *Caſual*. It is a Word perfectly well underſtood; and caſual Homicide, in their Apprehenſion, carries along with it a very different Meaning from Homicide wilfully and felonioufly committed, though not proceeding from Malice long premeditated.

It was further obſerved upon this Act with regard to caſual Murder, that having been firſt paſſed during the Uſurpation, in the Parliament 1649, and another Act having been made the ſame Day, declaring that there ſhould be no Remiſſions in capital Crimes, it could not be ſuppoſed that Murder upon Suddenty, without premeditated Malice, was underſtood to be a capital Crime, and unpardonable; from which it was inferred, that when the ſame Statute was re-enacted in the 1661, it could not be intended that this Crime ſhould be capital. But this Argument is extremely inconcluſive; for although it was thought proper, during the Uſurpation, to paſs an Act declaring capital Crimes unpardonable, yet it was not thereby intended to alter the general Nature of Crimes, or to make thoſe not capital which formerly were ſo.—The Act extends to all capital Crimes whatever, many of which were attended with a much leſs Degree of Guilt than wilful Murder, though committed upon Suddenty; for Example, Theft, Robbery, Hamefucken, *&c.* So that the Argument goes a great Way too far, in ſuppoſing that no Crime leſs than Murder upon forethought Felony, was underſtood to be capital and unpardonable: And beſides, as the Act here founded on was not renewed after the Reſtoration, it is now out of the Queſtion.

It was further ſaid for the Pannel, that though, in the Caſes mentioned in the Statute, the Law ordained Homicide not to be capital

capital, yet it is neither ſaid, nor ſuppoſed that the former Law, whereby Pannels were intitled to plead againſt a capital Puniſhment, was thereby abrogated; and that ſundry Caſes might be ſtated which did not fall directly under the Exceptions mentioned in the Statute, and where yet it could not be diſputed that a capital Puniſhment would not fall to be inflicted.

The Purſuers have no occaſion in this Caſe to plead, that Perſons guilty of wilful Homicide committed without forethought Felony, were by this Statute deprived of a Defence which was competent to them before the Statute was made, they do apprehend that ſuch Homicide was puniſhed capitally, before the Statute, as well as after it. At the ſame time, if the Law had ſtood otherways, it cannot well be doubted, that upon a ſound Conſtruction of the Statute, ſuch Homicide would thereafter have fallen to be puniſhed capitally; for when the declared Intention of the Statute was to remove all *Doubts* and Queſtions that might thereafter ariſe concerning Purſuits for *Slaughter*; and when in removing theſe Doubts, it makes particular Mention of Homicide in lawful Defence, and Homicide committed upon Thieves and Robbers, or in the Time of maſterful Depredations, *&c.* as not liable to a capital Puniſhment, it is, with Submiſſion, impoſſible to ſuppoſe, that if the Legiſlature had meant and intended that wilful and intentional Homicide committed on Suddenty was not to be puniſhed capitally, it would not have been particularly mentioned. It can never be imagined, that when the Legiſlature, for the Purpoſe of removing all Doubts and Queſtions, was anxiouſly enumerating a Variety of Caſes where Death was not to be inflicted, that they would have omitted a Caſe which the Pannel himſelf muſt admit was a hundred times more doubtful than any of theſe particularly mentioned. It would be, with Submiſſion, abſurd to ſuppoſe, that the Legiſlature would have enacted in the Caſes that were more clear, and have left the moſt difficult of them in the dark; as ſurely the greateſt Advocates for Slaughter on Suddenty, muſt admit, that it is much more culpable than any of the other Species of Homicide mentioned in the Statute.

The Purſuers ſhall not maintain, that the Statute is to receive ſo *Judaical* a Conſtruction, as that every other Homicide which does not fall directly within the ſtrict Letter of the Statute, was to be puniſhed capitally. Other Caſes might, no doubt, be figured, which, though they do not fall within the Words, do fall within

the Spirit of the Statute. The Legiſlature has therein made an Enumeration of ſundry Particulars, which are ſufficient to explain the Nature of the Caſes which do not fall to be capitally puniſhed; and, as wilful and intentional Homicide, though committed on Suddenty, is, in its Nature, totally different from all and each of the Caſes mentioned in the Statute, the Purſuers may fairly conclude, that upon no juſt Conſtruction of the Statute, this Caſe can be brought under either the Words or Spirit of it.

Caſes in behalf of the Purſuers.

The Purſuers ſhall now proceed to ſtate a few Caſes, in order to ſhow your Lordſhips, that the Law of *Scotland* has been underſtood to be agreeable to what has been maintained on their Part, and that both before and after the Statute 1661.

Bruce contra Marſhall, 1644.

In the Caſe of *Bruce* contra *Marſhall*, the 3d of *April* 1644, Slaughter was libelled, and he was condemned upon his own judicial Confeſſion, from which it appears that he was ſo far from having any Forethought, that he ſuffered not only the greateſt Provocation in Words, but was even beat with Hands and Feet by the Defunct, while he was on the Ground; but, at laſt, getting up, and (as the Confeſſion bears) being overcome with Paſſion, he drew a Knife, and ſtruck at him in two ſeveral Places of his Body, whereby he died; and upon this Confeſſion, where there was Suddenty, Provocation, and Paſſion, he was brought in as guilty, and condemned to be beheaded.

Murray contra Gray, 1678.

In the Caſe, *Murray* contra *Gray*, 10th *June* 1678, the Lords found the Libel relevant, and that there was no Neceſſity of any diſtinct Probation for proving *precogitated Malice*, which clearly ſhows, that Homicide, though not upon Forethought, was capital.

Aird 1693.

In the Caſe of *Aird*, who was indicted in the 1693, for the Murder of *Agnes Bain*, having given her ſome Strokes on the Side and Belly with his Foot, by which ſhe fell into Fainting Fits, and immediately died. The Defence was great Provocation and caſual Homicide.—Provocation, in as far as ſhe threw a Chamber-pot in his Face, and when he gave her hard Words, ſhe and her Neighbour fell upon him and beat him, upon which he gave her the Strokes above mentioned; and in that Trial it was argued, that there was no *animus occidendi*; no previous Malice nor mortal Weapon; and the Arguments urged in Defence of the preſent Pannel, were pleaded for the Pannel in that Caſe: Nevertheleſs, the Lords found

found the Libel relevant, repelled the Defences, and, upon the Proof, he was ſentenced to die.

George Cumming. 1695.

In the 1695, *George Cumming*, Writer in *Edinburgh*, was indicted for the Crime of Murder or Man-ſlaughter of *Patrick Falconer*. The Defence now offered for the Pannel, upon the Diſtinction between Forethought and *chaude melle*, was there pleaded, nevertheleſs the Libel was found relevant, and the Jury returned a Verdict *Guilty of Man-ſlaughter*. Upon which he was condemned *to die*.

Hamilton of Green. 1716.

In the Caſe of *Hamilton* of *Green*, 30th *June* 1716. The Pannel offered to prove, that he was accidentally at the Houſe of *Thomas Arkle*, of whoſe Murder he was accuſed, upon the Day libelled, with ſome of his Acquaintances, and had no deadly Weapon along with him: That he became intoxicated to a great Degree, and having left the Houſe, and returned to aſk for the Slip or Cover of the Sheath of a Sword, the Defunct gave him moſt indecent, injurious, and ſcurrilous Language; and, perſiſting in it, the Pannel puſhed, or ſtruck at him with his Sword, having the Scabbard thereon, which, he had Reaſon to believe, had a Crampet upon it; and, being ſtill more and more provoked, by repeated injurious Words, to protect himſelf from farther Inſolence, which he had Reaſon to look for, the Pannel ſtill remaining on Horſeback, the Defunct ruſhed himſelf upon the Sword: And this circumſtantiate Fact was offered to be proved; nevertheleſs the Libel was found relevant, and the Pannel's whole Defences repelled; and, upon the Proof, he was ſentenced to have his Head ſevered from his Body, and was accordingly beheaded.

Thomas Roſs and Jeffrey Roberts. 1716.

In the Caſe of *Thomas Roſs* and *Jeffrey Roberts*, 20th *July* 1716, it was urged for the Pannels, That, being Recruits, lately come from *England* to *Scotland*, and not knowing the Way, they aſked the Defunct the Road to *Edinburgh*, who refuſing to ſhow it, and one of the Pannels expoſtulating with him, why he treated a Stranger ſo, that came to ſerve the King; he uttered very diſreſpectful Words with reſpect to his Majeſty; and one of the Pannels having called him *Villain*, for ſuch opprobrious Expreſſions, he came up to *Roſs*, and, with his Fiſt, gave him a Blow on the Face, and then pulled him down to the Ground, and beat him with a great Stick, to the *imminent Danger of his Life*, ſaying, That he ſhould never go alive out of his Hands; and *Roberts* having come to his Aſſiſtance, and reſcued him a little, *Roſs*, the Pannel, gave

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the Defunct a Wound with a Knife, whereof he died. *Roſs* pleaded, There neither was, nor could be, forethought Felony or premeditated Malice againſt a Perſon whom he had never ſeen before: That it was committed upon Suddenty: That he had the higheſt Provocation, both verbal and real; nevertheleſs, by the Interlocutor, *Roſs*, the Pannel, his giving the Wound, was found relevant to infer the Pain of Death. And the Defence, from Provocation by Words, and receiving a Blow on the Face, being pulled down to the Ground, and beat, *with a great Stick, to the Danger of his Life*, jointly ſuſtained relevant to reſtrict the Libel to an arbitrary Puniſhment, was found to be elided by the Reply, That, at the Time of giving the Wound to the Defunct, the Defunct's Hands were held by *Jeffrey Roberts*, the other Pannel. From this it is evident, that Slaughter, upon Suddenty, and by a Perſon who had received the greateſt verbal, and even real Injuries, is, by that Interlocutor, found to be capital.

Many other Caſes might be mentioned; but theſe are ſufficient to ſhow, that *wilful Homicide*, by the Law of *Scotland*, has been always underſtood to be puniſhable with the Pains of Death; and that the Pains of Death have uniformly been inflicted upon that Crime; and that, whether it was committed upon Suddenty, or upon forethought Felony.

Caſes in behalf of the Pannel.

Certain Caſes were mentioned on behalf of the Pannel, in order to eſtabliſh a Diſtinction betwixt Homicide, committed on Suddenty, and upon forethought Felony; and to prove, that the latter only, and not the firſt, does, by the Law of *Scotland*, admit of a capital Puniſhment. But, when theſe Caſes are duly conſidered, the Purſuers are humbly perſuaded your Lordſhips will be of opinion, that they do by no means prove what is intended to be eſtabliſhed by them.

Bruce of Auchinbowie, 1709.

The firſt Caſe appealed to, was that of *Elizabeth Elphinſton*, and his Majeſty's Advocate, againſt Captain *William Bruce* of *Auchinbowie*, in the 1709. Captain *Bruce* was there indicted for the Murder of *Charles Elphinſton* of *Airth*. They had been together at my Lord *Forreſter*'s Houſe at *Torwoodhead*,—where they appeared to be in Friendſhip together; but, on their Way home, a Quarrel aroſe betwixt them, and Mr. *Elphinſton* was killed. Sundry Defences were ſtated for the Pannel; and, among others, he pleaded her Majeſty's Act of Indemnity, in bar of the Proſecution. To which it was anſwered, That wilful Murder was excepted

cepted from the Act of Indemnity, and therefore it could not avail the Pannel.

To this it was replied, That the Exception in the Act of Indemnity did only reſpect Murder done upon Forethought and premeditated Deſign; and that, although the Indictment did libel in general Terms Forethought and Premeditation, yet, as no Circumſtances were condeſcended upon, from whence the ſame could be inferred, it could only be conſidered as Slaughter committed on Suddenty, which did not fall under the Exception of the Act of Indemnity. And, the Court, upon adviſing mutual Informations, "Suſtained the Defence of her Majeſty's moſt gra-" cious Act of Indemnity, proponed for the ſaid Pannel, relevant " to elide the ſaid Libel, and therefore deſerted the Diet thereof " againſt him, *ſimpliciter* diſmiſſed him from the Bar, and diſ-" charged him to be farther troubled for the ſaid Crime in Time " coming."

It is ſubmitted, if this Caſe is at all to the Purpoſe. It does indeed prove, that your Lordſhips Predeceſſors were of opinion, that the Exception in the Act of Indemnity did only comprehend the Caſe of Murder upon premeditated Malice, and that, in the Caſe libelled, there were not ſufficient Circumſtances condeſcended upon to bring the Crime charged under that Denomination; but it will by no means from thence follow, that the Court was in that Caſe of opinion, that, laying aſide the Act of Indemnity, the Crime charged could not be puniſhed capitally. It has been already obſerved, that although Murder, in every Degree, deſerves the Pains of Death, that yet the Crime admits of different Degrees of Aggravation; and therefore the Legiſlature might, with great Propriety, pardon Murders committed upon a ſudden Quarrel, and, at the ſame time, not pardon ſuch as were coolly and deliberately meditated.

The next Caſe mentioned on the Part of the Pannel, was that of *William Hunt*, Dragoon in Sir *Richard Temple*'s Regiment, who was indicted for the Murder of *Henry Macmillan*, Fleſher in *Dalkeith*, in the 1711. It was in that Caſe alledged, in defence for the Pannel, that a Mob had aroſe in the Town of *Dalkeith*, which was headed by the Defunct, and attacked ſome of the Soldiers who were quartered in that Town, and proceeded ſo far as to beat them, throw them down in the Street, trample them upon the Ground, and otherwiſe maltreat them in a barbarous and cruel Manner,

Will. Hunt, 1711.

to the Effuſion of their Blood; that the Pannel having been at that Time upon the Guard, he was called out by the Serjeant who commanded the Guard to quell the Mob, and relieve the Perſons who were ſo attacked and abuſed; and that it was in this Tuilzie that the Defunct, who headed the Rabble, was killed; and from thence it was argued on Behalf of the Pannel, that as he, at the Time libelled, was one of the Guard upon Duty, and was ordered out under Arms, to quell a Mob, and relieve his Fellow-ſoldiers, who were in no ſmall Danger, from the Fury and Inſolence of the Rabble; that what Blows he gave on that Occaſion were lawfully given. 2*do*, It was alledged, that what was done was in neceſſary Defence, either of himſelf, or of the other Dragoons who had been thus attacked; and that, ſuppoſing he had been guilty of any Exceſs, he could only be ſubjected to an arbitrary Puniſhment; and, *ſeparatim*, it was pleaded, that, as the Defunct was killed *in rixa*, whereof he was himſelf the Author, the Pannel could not be ſubjected to the Pains of Death, the more eſpecially, as it appeared that the Pannel could have no *animus occidendi*, for that, notwithſtanding he was armed both with a Sword and a Muſquet, he did not uſe his Muſquet, in the Manner that was moſt certain to kill, but only ſtruck with the But-end of it: And the Court, upon adviſing mutual Informations, pronounced the following Judgment: "Find the ſaid *William Hunt*, Pannel, his going behind *Macmil-*
"*lan*, the Defunct's Back, while ſtanding peaceably in the
"Street, without Arms, and knocking him down, by a Stroke
"upon his Head with the But-end of his Muſquet, whereof
"he died next Day, relevant to infer the Pains of Death, and
"Confiſcation of Moveables; and find this Defence, *viz.* that
"there being a Tumult in *Dalkeith*, in which ſome of the Dra-
"goons were maltreated or troden down; and the Pannel being
"upon the Guard under Duty at the Time, was commanded
"out for quelling the ſaid Mob and Tumult, and relieving the
"Dragoons; and that the Defunct, *Macmillan*, having been in
"the Rabble and Tumult, which attacked that Party of the
"Guard commanded out, or any of them, before the Stroke was
"given, relevant to aſſoilzie the Pannel *ſimpliciter*, and elide the
"Libel; and *ſeparatim* find, that the Stroke being given *in rixa*,
"or a Tumult, where the Defunct was Author of the Tumult
"or *rixa* himſelf, or that the Stroke was given in defence of the
"Pannel,

" Pannel, or any of his Fellow-ſoldiers, when attacked, relevant " to reſtrict the Libel to an arbitrary Puniſhment."

It is humbly ſubmitted to your Lordſhips, with what Propriety this Judgment is appealed to, in order to eſtabliſh the general Propoſition maintained by the Pannel, *viz.* that wilful Homicide, if committed on Suddenty, without premeditated Malice, is not puniſhable with the Pains of Death. If the Purſuers rightly underſtand the Caſe, it proves the very reverſe; premeditated Malice was not ſo much as libelled; nor was a ſingle Circumſtance condeſcended on in the Indictment, from which forethought Felony could be inferred; and yet the *Libel, as laid, is found relevant to infer the Pains of Death.*

Nor does the latter Part of the Judgment in the leaſt impugn the Doctrine maintained upon the Part of the Purſuers. The Judgment reſtricting the Libel to an arbitrary Puniſhment, is laid upon this, that the Defunct himſelf was the *auctor rixæ*, and there ſeems to be little Doubt that the Judgment is founded in Law. When the Defunct himſelf had raiſed a Mob, who were beating and abuſing the Soldiers in a cruel and barbarous Manner, to the Effuſion of their Blood, it would have been a hard Caſe, if the Pannel, acting in defence of himſelf and his Fellow-ſoldiers, ſhould ſuffer the Pains of Death, becauſe he killed the Perſon who headed the Mob, the more eſpecially, when it does appear from the Circumſtances of the Caſe, that he had no Intention to kill. He only gave a Stroke with the But-end of his Muſquet, which, though it no doubt might kill, yet it was the Weapon the leaſt lethal of any he was then poſſeſſed of. If he had intended to kill, he infallibly would either have fired with his Muſquet, or uſed the Sword which he had at his Side.

The next Caſe mentioned upon the Part of the Pannel, was that of *Peter Maclean*, in the 23d *January* 1710, indicted for the Murder of *James Ewing*. In which Caſe the Court pronounced the following Judgment: " Find the Indictment relevant to infer the " Pains of Death, and ſuſtain the Defence proponed for the Pan- " nel, in theſe Terms, *viz.* that the Defunct quarreled the Pannel " under the Name of Raſcal, how he durſt carry a Fowling- " piece, and that, *if the Prince had his own, he durſt not ſo do*; " and adding theſe Words, *that her Majeſty was but a Whore*, " and thereupon *aſſaulted the Pannel* for taking the Carabine from " him,

Peter Maclean, 1710.

" him, relevant to reſtrict the Libel to an arbitrary Puniſh-
" ment."

Upon this Caſe it is obſervable, that although the Indictment does not libel premeditated Malice, nor condeſcend upon a ſingle Circumſtance from which the ſame could be inferred, (as indeed the Pannel was not ſo much as of the Defunct's Acquaintance) yet the Libel was found relevant to infer the Pains of Death; and therefore the Purſuers apprehend, that it is truly a Judgment in favour of the Doctrine maintained upon their Part.

And as to the Defence which was there ſuſtained relevant to reſtrict the Libel to an arbitrary Puniſhment; it is founded upon very peculiar Circumſtances, and cannot well be drawn into a Precedent for determining other Caſes, far leſs for determining a very general and very important Point of Law.

At the ſame Time, very ſtrong Reaſons did there concur for the Reſtriction: For, beſides the high verbal Provocation he received, an Aſſault was truly made upon him, in order to rob him of his Muſquet.—As he did not know the Defunct, he had Reaſon to apprehend, that the Attack was made with a felonious Intention, and conſequently intitled to reſiſt it; and, he was particularly called upon in Duty, as a Soldier, not to part with her Majeſty's Arms, with which he was intruſted; and, it appears, that when he fired, it proceeded from real Apprehenſions of Danger; for he ſhowed an Unwillingneſs to kill, having firſt endeavoured to defend himſelf, by clubbing his Muſquet.

Finhaven, 1728. The next Caſe which was mentioned for the Pannel, was the noted Caſe of *Finhaven*. But, in what Shape the Pannel can avail himſelf of it, is to the Purſuers inconceivable. The Circumſtances of that Caſe are well known to all your Lordſhips, and therefore need not be particularly ſtated. The Interlocutor of the Court, upon adviſing very learned and elaborate Informations, is in theſe Words: " Find, that the Pannel, at the Time
" and Place libelled, having, by Premeditation, and forethought
" Felony, with a Sword, or other mortal Weaponi wounded the
" deceaſed *Charles*, Earl of *Strathmore*, of which Wound, he,
" the ſaid Earl, ſoon thereafter died, or that he, the Pannel, was
" Art and Part thereof, relevant to infer the Pains of Law; but
" allow the Pannel to prove all Facts and Circumſtances he can,
" for taking off the aggravating Circumſtances of Forethought
" and Premeditation: As alſo, find, that he, the ſaid Pannel,
" Time

" Time and Place foreſaid, having with a Sword, or other mor-
" tal Weapon, wounded the ſaid deceaſed Earl, of which Wound
" his Lordſhip ſoon died, or that he, the Pannel, was Art and
" Part thereof, *ſeparatim* relevant to infer the Pains of Law, and
" repel the Defences proponed for the Pannel."

This, in the Purſuer's Apprehenſion, is a clear Deciſion againſt the Pannel, as to the Point now in diſpute.—Notwithſtanding that all the Arguments which are now urged on behalf of the Pannel, were there pleaded with great Ingenuity, yet the Defences were repelled, and the Pannel's killing the deceaſed Earl, with a Sword, or other mortal Weapon, was, independent of Premeditation, and forethought Felony, found relevant to infer the Pains of Law, which clearly cuts down the Diſtinction now endeavoured to be eſtabliſhed.

The laſt Caſe which was mentioned on this Point, in behalf of the Pannel, was that of Lieutenant *Robertſon*, in the 1758, indicted for the Murder of Lieutenant *Robert Ewing*. But the Purſuers are at a loſs to diſcover for what Purpoſe that Caſe is mentioned. The Defence which was pleaded in that Caſe was *Self-defence*, and which, indeed, was very ſtrongly qualified; and the Interlocutor pronounced by the Court was in theſe Words: " Find the Indict-
" ment relevant to infer the Pains of Law, but allow the Pannel a
" Proof of all Facts and Circumſtances that may tend to his Ex-
" culpation, or Alleviation of his Guilt." Lieutenant Robertſon 1758.

This Interlocutor was very properly adapted to the Caſe, without ſuppoſing any Diſtinction betwixt Slaughter on forethought Felony, and on Suddenty. If the Pannel proved his Defence to its full Extent, it was ſufficient to exculpate; and although he ſhould have failed in proving, that Lieutenant *Ewing*'s Death was abſolutely neceſſary to preſerve his own Life, yet if he proved that he was *in periculo vitæ conſtitutus*, this might be relevant to alleviate.

Upon the whole, the Purſuers are humbly perſuaded, that your Lordſhips will be of opinion, that there is no Relevancy in any of the Defences proponed for the Pannel, except in ſo far as he alledges that the Earl was killed by Accident, and not intentionally; and therefore, that your Lordſhips, *quoad ultra*, will repel the Pannel's Defences, find the Libel relevant, and remit the Pannel, with the Indictment, as found relevant, to the Knowledge of an Aſſize.

In reſpect whereof, &c.

RO. MACQUEEN.

" ... Lieutenant, wounded the Field-Marshal Earl, of which Wound
" ... the Lordship soon died, or that the Flannel was Art and
" ... Part thereof, &c. when relevant to infer the Pains of Law, and
" ... the Defender ordained for the Flannel."

... Point, as to the Point now in dispute.—Notwithstanding
... that all the Arguments which are now urged, on Behalf of the
... Flannel, were there pleaded with great Ingenuity, yet the Defence
... was repelled, and the Flannel's killing the deceased Lord, with a
... Sword, or rusty Weapon, was, independent of Premeditation,
... and foreboding in Relation, found relevant to infer the Pains of
... Law, which clearly runs down the Diminution now endeavoured to
... be ...

... Court which was appealed on this Point, in behalf of the
... Flannel, was that of Lieutenant ... in the 1758, in the
... case of Murder of Lieutenant Archy Bailey. ... the Pursuers
... are at a loss to discover for what Purpose that Case is mentioned.
... The Defence which was pleaded in that Court was Self-defence, and
... which, indeed, was very strongly supported; and the Interlocutor
... pronounced by the Court was to these Words: " Find the Indefi-
... nitely relevant to infer the Pains of Law, but allow the Flannel a
... Proof of all Facts and Circumstances that may tend to his Ex-
... culpation, or Alleviation of his Guilt."

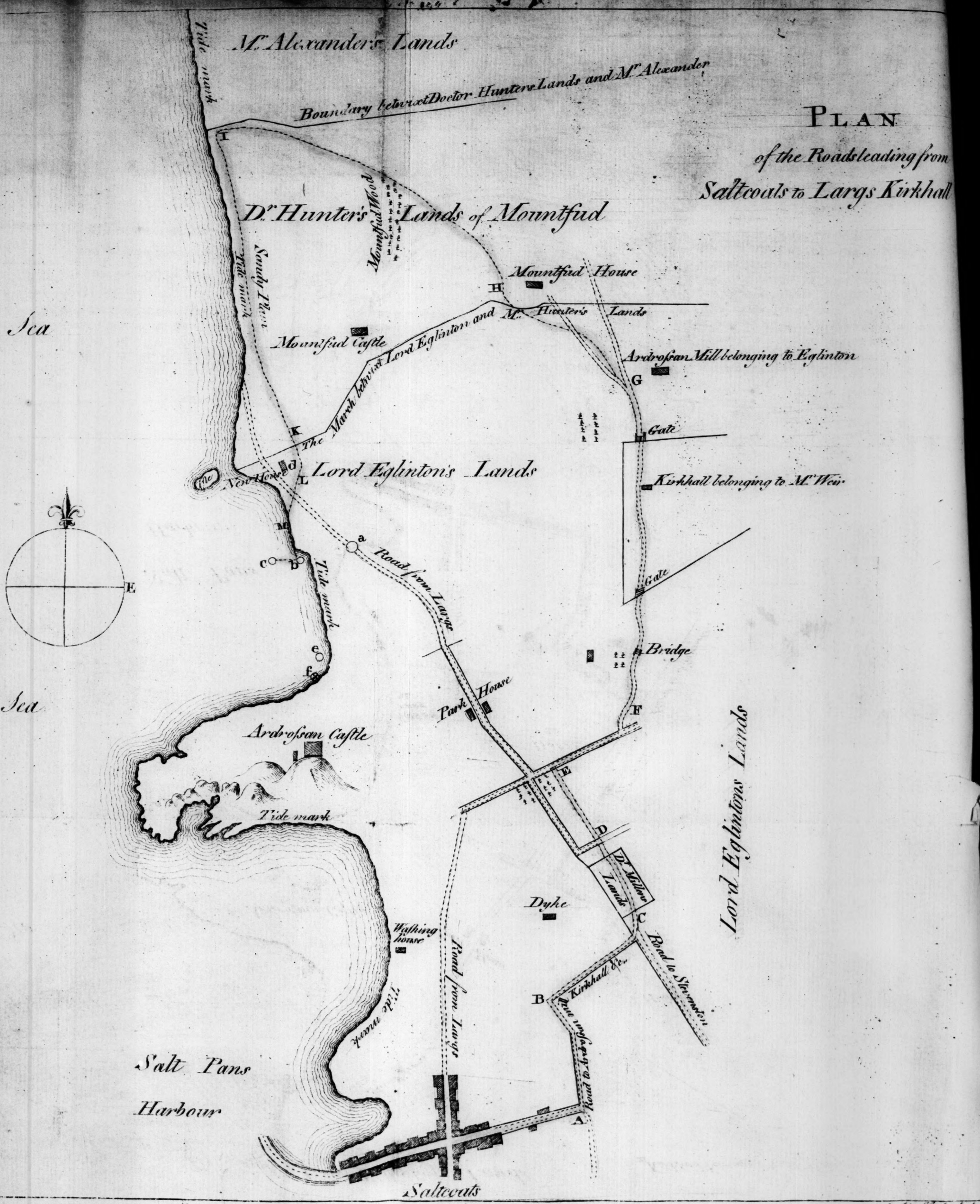
This Interlocutor was very properly adapted to the Case, with-
out stopping any Diligence before Answer on so fore-thought Re-
lony, and on Deliberate. If the Flannel proved his Defence to its
full Extent, it was sufficient to exculpate; and although he should
have failed in proving what Lieutenant Bailey's Death was abso-
lutely necessary to preserve his own Life, yet if he proved that he
was in previous safe custody, this might be relevant to alleviate.
From the whole of the Pursuers argument, it is evident, that your
Lordships will be of opinion, that the Plea is no Relevancy in any of
the Defences proponed for the Flannel, except in so far as he al-
ledges that the Earl was killed by Accident, and not intentionally;
on therefore, that your Lordships, quoad ultra, will repel the Pan-
nel's Defence, find the Libel relevant, and remit the Flannel, with
the Indictment, as found relevant, to the Knowledge of an Af-

In respect whereof, &c.

JO. MACQUEEN.

PLAN

of the Roads leading from Saltcoals to Largs Kirkhall



A. Bell Sculpt.

EXPLANATION.

The GREEN LINE, A, B, C, &c. and b, shews the way that Mr. Campbell and Mr. Brown went from Saltcoats to the place at b, where they did meet with the late Earl of Eglinton.

is a road inclosed on each side.

a road inclosed on one side.

a road that is not inclosed.

a, is the place where his Lordship left the coach.

b, the place where his Lordship found Mr. Campbell, and is distant from a 228 ells, and from the tide mark 36 ells.

c, the place where Mr. Campbell did fall, and is distant from b 120 ells.

e, is the place where Mr. Brown stood, when he heard the report of Mr. Campbell's gun, and is distant from c 432 ells.

f, is the place where Mr. Campbell did seize a cart-load of spirits from Bartleymore.

d, is the new house of Ardrossan.

The ground at letter I, is high, commanding a view of the shore, particularly the spots called Castle-craigs, Horse-isle, and foot of Montfod burn, to which smugglers resort.

Montfod burn is the march betwixt Lord Eglinton's grounds and Doctor Hunter's, and runs towards the Horse-isle betwixt letters K, and L.